UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 81-1567
81-1607

JUAN FUMERO SOTO, ET AL.,
Plaintiffs-Appellees-Cross-Appellants,

v.

CARLOS CHARDON, ETC., ET AL.,
Defendants-Appellants-Cross-Appellees.

Before COFFIN, *Chief Judge*,
GIBSON,* *Senior Circuit Judge*,
and BOWNES, *Circuit Judge*.

ORDER OF COURT

Entered July 28, 1982

The motion of Chardon and Ramos, defendants-appellants, for stay of mandate pending application to the Supreme Court for a writ of certiorari is granted upon the condition that said application is filed by August 16, 1982, and the Clerk of this Court is given notice thereof.

The petition for rehearing on modification of judgment is denied. The date of filing is controlled by the Federal Rules and Federal Rule of Civil Procedure 6 expressly excludes from computation "a Saturday, a Sunday or a legal holiday" and

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* Of the Eighth Circuit, sitting by designation.

Federal Rule of Appellate Procedure 26 contains the same exclusion.

By the Court:

/s/ Dana H. Gallup
DANA H. GALLUP
Clerk.

UNITED STATES COURT OF APPEALS
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JUAN FUMERO SOTO, ET AL.,
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Defendants-Appellants-Cross-Appellees.

By COFFIN, *Chief Judge,*
GIBSON,* *Senior Circuit Judge,*
and BOWNES, *Circuit Judge.*

ORDER OF COURT

Entered July 6, 1982

The petition for modification of judgment by plaintiffs-appellees and cross-appellants is granted. Those plaintiffs who received their letters of demotion on June 17, 1977, or thereafter are not time-barred. The last two lines on page 31 of the slip opinion and the first two lines on page 32 should be changed to read as follows:

> In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those

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* Of the Eighth Circuit, sitting by designation.

plaintiffs who received letters of notice of demotion on June 17, 1977, or thereafter is affirmed, etc.

By the Court:

/s/ Dana H. Gallup,
DANA H. GALLUP,
Clerk.

By:/s/ Francis P. Scigliano
FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 81-1567
81-1607

JUAN FUMERO SOTO, ET AL.,
Plaintiffs-Appellees-Cross-Appellants,

v.

CARLOS CHARDON, ETC., ET AL.,
Defendants-Appellants Cross-Appellees.

By COFFIN, *Chief Judge,*
GIBSON,* *Senior Circuit Judge,*
BOWNES, *Circuit Judge.*

ORDER OF COURT

Entered July 6, 1982

The petition for rehearing by defendants-appellants and cross-appellees is denied for the following reasons. The district court found in ruling on defendants' motion for summary judgment as to Ortiz Rivera:

> The present type of cause of action accrues on the date Plaintiff is officially informed that he is being demoted and he is aware of the reasons for this demotion. It is at this point that there is present a "complete and present cause of action." *Rawlings* v. *Ray*, 314 U.S. 96, 98 (1948). In the present case this occurred on June 21, 1977. Therefore, a complaint filed on June 19, 1978 would be timely.

Joint Appendix at 73.

In arriving at this conclusion, the court considered plaintiff's sworn statement to the effect that he was orally informed on

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* Of the Eighth Circuit, sitting by designation.

May 27, 1977, that he was going to be removed from his position as school director and assigned to his permanent position of teacher. The court specifically found:

> First from the informal and unofficial information Plaintiff received in May, 1977 one could not conclude that Plaintiff lost all reasonable expectations that he would continue at his position. Second, and along the same lines from the informal conversation one cannot conclude that Plaintiff was in fact demoted or reassigned. Until he was informed officially Plaintiff had no reason to believe that he was demoted.

Id. at 72.

We do not think the district court erred in making this finding. In the case cited by defendants, *McWilliams* v. *Escambia County School Board*, 658 F.2d 326 (5th Cir. 1981), the district court found that the plaintiff reasonably knew prior to the critical date that his position was being changed. The court of appeals found that "the record contains ample evidence to support the district court's ruling." *Id.* at 328. This is the obverse of the fact situation in *McWilliams* but the same rationale applies.

We rule that, as with all the other plaintiffs, the statute of limitations started to run as to Ortiz Rivera on the day he received the official letter of demotion, which was on June 21, 1977. The class action was, therefore, timely filed.

The second argument in the petition, that *American Pipe* should control, was discussed thoroughly in defendants-appellants' brief and in our opinion. No new reasons have been advanced that persuade us we should change the opinion in this regard.

By the Court:

/s/ Dana H. Gallup,
DANA H. GALLUP,
Clerk.

By:/s/ Francis P. Scigliano
FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 80-1237, et al.

RAFAEL RIVERA FERNANDEZ, ET AL.,
Plaintiffs-Appellants,

v.

CARLOS CHARDON, ETC., ET AL.,
Defendants-Appellees.

On Remand From The Supreme Court
Of The United States

Before
CAMPBELL, BOWNES, and BREYER,
Circuit Judges.

Nos. 81-1567
81-1607

JUAN FUMERO SOTO, ET AL.,
Plaintiffs-Appellees-Cross-Appellants,

v.

CARLOS CHARDON, ETC., ET AL.,
Defendants-Appellants-Cross-Appellees.

Appeals From The United States District Court
For The District Of Puerto Rico
[HON. ROBERT A. GRANT,* *U.S. District Judge*]

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* Of the Northern District of Indiana, sitting by designation.

Before
COFFIN, *Chief Judge*,
GIBSON, ** ***Senior Circuit Judge*,**
BOWNES, *Circuit Judge*.

Sheldon H. Nahmod, Hiram R. Cancio, Harry R. Nadal-Arcelay, Jaime R. Nadal-Arcelay, Jesus R. Rabell-Mendez, and ***Cancio Nadal & Rivera*** on brief for appellants.

K. Martin Worthy, John G. DeGooyer, Stephen L. Humphrey, Hamel, Park, McCabe & Saunders, Hector Reichard De Cardona, Secretary of Justice, and ***Ines Eguia De Casanova,*** Attorney, Department of Justice of Puerto Rico, on brief for appellees.

June 8, 1982

BOWNES, *Circuit Judge*. Before us in the instant action are two groups of consolidated cases that represent fifty-five and thirty-six cases, respectively. All ninety-one cases are actions based on 42 U.S.C. § 1983 charging illegal acts of political discrimination. The first group of consolidated cases, *Fumero Soto* v. *Chardon*, is an appeal from a jury verdict that defendants are liable to plaintiffs in the fifty-five cases and from the relief ordered by the court in its equitable power. The second group of consolidated cases, *Rivera Fernandez* v. *Chardon*, is on remand from the Supreme Court, which, in *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981), reversed our decision on the statute of limitations issue in these cases,

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** Of the Eighth Circuit, sitting by designation.

Rivera Fernandez v. *Chardon*, 648 F.2d 765 (1st Cir. 1981).[1] The *Rivera Fernandez* cases had been dismissed by the district court and were not tried on the merits. We deal with these two sets of cases together because they both present questions concerning the tolling of the statute of limitations that are not foreclosed by the prior decisions in *Rivera Fernandez*. In addition, the defendants in *Fumero Soto* argue that the jury verdict was not supported by the evidence and that the damages award against the Puerto Rico Department of Education violated the eleventh amendment; plaintiffs in *Fumero Soto* contend that the individual defendants enjoy no immunity.

The Facts and Case Histories

All the *Fumero Soto* and *Rivera Fernandez* cases arose out of essentially the same facts. The plaintiffs in all cases held nontenured administrative positions in the Commonwealth of Puerto Rico Department of Education during the school year 1976-77. The defendants are Carlos Chardon, then Secretary of Education for the Commonwealth, Oscar Ramos, then and now Assistant Secretary for Personnel in the same department, and Maria Socorro Lacot, now the Secretary of Education, who was substituted for Chardon in his official capacity. Chardon and Ramos were originally sued in both their official and individual capacities. The events leading up to the instant actions began in January, 1977, when Carlos Romero Barcelo of the New Progressive Party (NPP) replaced Rafael Hernandez Colon of the Popular Democratic Party (PDP) as governor. Chardon and Ramos, members of the NPP, soon assumed positions in the Department of Education under the new regime. Chardon and Ramos, according to plaintiffs' complaints, then determined to remove nonpermanent administrative personnel who were active in the PDP or parties other than the NPP.

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[1] Our decision in *Rivera Fernandez* dealt with only twenty-three of the cases; we disposed of the other thirteen cases with separate but identical judgments. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341, 3341 n.1 (Nov. 2, 1981).

All the plaintiffs received letters—most of them in May and June 1977—from Julio Cintron Lopez, Director of the Teaching Personnel Division, informing them that they would not be reappointed to the administrative positions they currently held for the school year 1977-78 and that they would instead be required to return to the lower-paying, tenured teaching positons that they had held before. Three of the *Rivera Fernandez* plaintiffs had not previously held tenured teaching posts, so they were discharged. Most, if not all, of the plaintiffs sent letters of protest to Chardon, objecting to their demotion or termination and informing him that they were referring the matter to the Teachers Association of Puerto Rico for appropriate legal action.[2]

On June 19, 1978, one demoted employee, Jose Ortiz Rivera, filed a class action against Chardon and Ramos in their individual and official capacities on behalf of all persons discharged or demoted by Chardon and Ramos for political reasons, claiming a violation of first and fourteenth amendment rights protected by 42 U.S.C. § 1983[3] and P.R. Laws Ann. tit. 18, §§ 214, 249a,

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[2] The letters were all virtually identical, the texts of which read in substance as follows:

> Dear Mr. Secretary:
>
> I have received a letter from the Department you direct dated [date], signed by Mr. Julio Cintron Lopez, Director of the Teaching Personnel Division. I am not in agreement with your decision.
>
> To that effect, I have sent a copy of the letter to the Teachers Association of Puerto Rico, so that said organization would instruct its Legal Division to take the corresponding action.
>
> In the meanwhile, I will obey the order issued by you.
>
> Sincerely,

[3] 42 U.S.C. § 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

249e.[4] Class certification was denied on August 21, 1978, because the class was not so numerous that joinder was impracticable. Fed.R.Civ.P. 23(a)(1). Plaintiffs then filed complaints

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[4] P.R. Laws Ann. tit. 18, § 214 provides as follows:

> Every public-school teacher in active service through an appointment made in accordance with the school law, the regulations of the Department of Education, and the regulations of the Commonwealth Board for Vocational and Technical Education, who shall have practiced as such in a school of any category during the probation period hereinafter specified, shall be entitled to be contracted as a permanent teacher in the category in which he may be practicing his profession at the expiration of the said probation period, without any further proof of classification or professional ability than the holding of a regular license of the same category of the position held by the teacher and to have, in the opinion of the Department, performed satisfactory work. For the purposes of sections 214-218 of this title, no consideration shall be given to the time such teachers may have been practicing as temporary teachers. Such teachers shall be entitled to be contracted as permanent teachers in the municipality where they may be teaching at the expiration of the probation period. The time worked by teachers with regular certificates as substitutes and who have performed satisfactory work in positions of the same category shall be confirmed as probationary period. The equivalence of the two (2) years of probationary period shall comprise the work performed with a substitute or probationary contract during two (2) consecutive years. Such teachers shall be entitled to be contracted as probationary or permanent teachers in the municipality where they may be teaching when entitled to a regular position.

P.R. Laws Ann. tit. 18, § 249a provides as follows:

> For the purposes of sections 249a-249e of this title, all public-school teachers of Puerto Rico shall be considered as officers or employees of the Commonwealth Government while they are in active service, irrespective of the form and manner in which they may render their services to the people of Puerto Rico. By public-school teachers shall be understood, for the purposes of sections 249a-249e of this title, all teaching personnel, which includes both the teachers in charge of the teaching and special services directly connected with the teaching work, and the officers or employees in technical tasks or in school supervision and administration; all the teaching personnel contracted by the Vocational Education Board of Puerto Rico and those teachers contracted as such by other departments or agencies of the Commonwealth of Puerto Rico.

individually in January, 1979, the earliest filings occurring on January 10. The individual complaints repeated the claims of Ortiz Rivera's class suit.

The history of the *Rivera Fernandez* cases is as follows. The district court dismissed the cases on the ground that they were barred by Puerto Rico's one-year statute of limitations. *E.g.*, *Aviles Navarro* v. *Chardon*, 506 F. Supp. 229 (D.P.R. 1980). We reversed, holding that the letter notifications did not trigger the statute, but that the actual demotions and discharges did and that suit was filed within one year of these events. *Rivera Fernandez* v. *Chardon*, 648 F.2d 765 (1st Cir. 1981). The Supreme Court reversed, finding that *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), controlled and that the letter notifications started the statute running. *Chardon* v. *Rivera Fernandez*, 50 U.S.L.W. 3341 (Nov. 2, 1981).

Meanwhile, decision was reserved on the statute of limitations question in the remaining fifty-five cases *(Fumero Soto)*. These cases were consolidated for trial, and the trial was bifurcated into liability and damages phases. After a five-day trial of the liability issues, a six-person jury returned unanimous verdicts in favor of the plaintiffs. The jury was also asked to answer special interrogatories, whether Chardon or Ramos acted with malicious intent to deprive plaintiffs of their constitutional or other rights. The jury answered these questions in the negative. The district court then asserted its equitable power to declare a remedy and ordered the Department of Education to reinstate those plaintiffs still in its employ to the

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P.R. Laws Ann. tit. 18, § 249e provides as follows:

> The school authorities and all other authorities are hereby enjoined from all discrimination or reprisal against a teacher by reason of his affiliation, creed and political actions; and it is further forbidden that the circumstances mentioned above be taken into consideration in deciding questions such as transfers, work assignment, salary raises, promotions, scholarships, leaves of absence, and any other matters relative to the teacher's professional work or status.

positions they had held before their demotions and to give them back pay reflecting the difference in salary between their former positions and the positions to which they were demoted. Plaintiffs who had left the Department were held not entitled to reinstatement and were to receive back pay only for the period from the time of demotion to the time they left. On the basis of the jury's findings of no malicious intent, the court refused to award damages against Chardon and Ramos in their individual capacities or to award punitive damages. Defendants appealed; on August 14, 1981, we stayed that portion of the order requiring back pay because of "significant questions" as to its validity.

The Issues

The general issue is whether claims by any or all of the *Rivera Fernandez* and *Fumero Soto* plaintiffs were barred by the statute of limitations.[5] Before discussing the separate arguments raised, it is useful to mark a few recognized principles. In the absence of a federal statute of limitations, the analogous state statute is applied to the federal cause of action. *E.g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *O'Sullivan* v. *Felix*, 233 U.S. 318, 322 (1914). In Puerto Rico, the limitations period applicable to a § 1983 claim alleging violation of first amendment rights is one year. P.R. Laws Ann. tit. 31, § 5298(2); *Graffals Gonzalez* v. *Garcia Santiago*, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam). At least as a matter of *federal* law, the filing of a class action will toll the statute of limitations for named and unnamed members of the class, and the statute will resume running when class certification is denied. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 561 (1974).

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[5] We take it that statute of limitations defenses were preserved in all cases. Defendants state that they raised the affirmative defense in timely fashion, and there is no contrary evidence. Nor do we believe that the defense was subsequently waived in any case, although the record on which plaintiffs rely for this argument is lamentably unclear.

Under *American Pipe*, the one-year statute of limitations would have been tolled on June 19, 1978, when Ortiz Rivera filed his class action. The tolling would have ended, and the remaining portion of the limitations period would have recommenced running on August 21, 1978, when the district court declined to certify the class. Over half of the plaintiffs in both sets of cases had received notice of demotion more than one year before Ortiz Rivera filed suit, so their claims would already have been time-barred. The remaining plaintiffs would have had from one to one hundred and thirty-eight days to file individual complaints after August 21, 1978. The earliest individual complaints were not filed, however, until January 10, 1979, after expiration of the remaining one hundred and thirty-eight day period.

Plaintiffs mount three attacks on the statute of limitations: that *Ricks* should not be applied retroactively; that the letters of protest tolled the statute of limitations;[6] and that the denial of class action certification in Ortiz Rivera's suit did not merely reactivate the statute of limitations, the *American Pipe* rule, but instead caused it to run anew. It is important to determine at the outset the relationships between these three contentions. The critical dates must be kept in mind: May-June 1977, notification by letters; August 31, 1977, plaintiffs vacate their positions; June 19, 1978, class action filed; August 21, 1978, class action dismissed; and January 10, 1979, first individual complaint filed.

The first claim, nonretroactivity, is insufficient alone to save all but a few of the suits because it would merely move the accrual date from the dates demotion letters were received to the date plaintiffs had to leave their positions, August 31, 1977. The class suit was filed nine months, nineteen days after that, so that, under the *American Pipe* rule, when class certification was denied on August 21, 1978, only two months, eleven days

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[6] Plaintiffs also argue in the alternative that this issue should be certified to the Supreme Court of Puerto Rico.

would have remained for all plaintiffs to file complaints. The period thus would have expired on November 1, 1978, before which time no individual complaints had been filed.

The second position, that the letters of protest sent by plaintiffs were sufficient under Puerto Rican Law to toll the statute of limitations so that it commenced running anew, is also inadequate alone in all but a few cases. This would save the otherwise time-barred claims of those who received notice of demotion prior to June 19, 1977, but who did not write a protest letter until after that date. The filing of the class action would then have been timely as to them. After certification was denied on August 21, 1978, they would have had whatever time had not expired from the one-year period in which to sue individually. The unexpired time would be insufficient in most cases, however, to carry over into January.

The third contention, that denial of class certification on August 21, 1978, starts the one-year statute running from scratch, by itself would save claims that were based on notices of termination received within a year prior to filing of the class action, June 19, 1978. This rule alone would not help any of the *Rivera Fernandez* plaintiffs, all of whom received discharge notifications before June 19, 1977. In combination with the nonretroactivity contention, this would save all *Rivera Fernandez* and *Fumero Soto* claims because they would not accrue until August 31, 1977. In combination with the letter tolling contention, the third argument would save those additional claims in which notice was received before June 19, 1977, but a letter of protest was sent after that date.

The Tolling Effect of the Class Action

The linchpin of plaintiffs' contentions, therefore, is that, under Puerto Rican law, a class action will cause the statute of limitations to begin running anew. Puerto Rican tolling rules, rather than the federal rule of *American Pipe* in which the running of the limitations period is merely suspended, apply, unless they are inconsistent with federal law. *Board of Regents*

v. *Tomanio*, 446 U.S. 478, 483-86 (1980). Under P.R. Laws Ann. tit. 31, § 5303, the limitations period against an action ceases to run when the action is instituted in court; if the action is discontinued, the case law has held that the limitations period begins to run anew from that time. *E.g.*, *Feliciano* v. *Puerto Rico Aqueduct & Sewer Auth.*, 93 P.R.R. 638, 644 (1966); *Heirs of Gorbea* v. *Portilla*, 46 P.R.R. 279 (1934); *De Jesus* v. *De Jesus*, 37 P.R.R. 143 (1927). *See also Hernandez del Valle* v. *Santa Aponte*, 440 F. Supp. 254 (D.P.R. 1977), *rev'd on other grounds*, 575 F.2d 321 (1st Cir. 1978); *Bedard* v. *Consolidated Mutual Insurance Co.*, 313 F. Supp. 1021, 1021-22 (D.P.R. 1970). This tolling is effective only with regard to identical causes of action; the filing of one action does not toll the statute of limitations for all claims arising out of the same facts. *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d 315, 319-20 (1st Cir. 1978). The substantive claims asserted in Ortiz Rivera's class action complaint were identical to those alleged in the subsequent individual complaints. The question here is whether a class action is different from an individual complaint—at least as to unnamed plaintiffs in the class action—for purposes of the identical claim rule. The Puerto Rico Supreme Court has not ruled on this question. The obvious analogy is to the federal rule of *American Pipe*, wherein the running of the statute of limitations was suspended as to both named and unnamed class members. Defendants argue, however, that *American Pipe* cannot be used here because plaintiffs have resisted that part of the *American Pipe* rule that provides for suspension and have instead insisted that the statute of limitations run anew.

To the extent that defendants make an estoppel argument, we reject it, but the substance of their argument bears further consideration. Application of state tolling rules to § 1983 claims is required by 42 U.S.C. § 1988, *Board of Regents* v. *Tomanio*, 446 U.S. at 484-85; *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978), unless the state rules are inconsistent with the federal policy underlying § 1983, *Board of Regents* v. *Tomanio*, 446 U.S. at 485-86; *see Johnson* v. *Railway Express Agency, Inc.*,

421 U.S. 454, 465 (1975) (same as to § 1981 claims). Thus in a § 1983 case, the federal rule and underlying reasoning of *American Pipe* are not generally applicable. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. at 466-67. *But see Morton* v. *Charles County Bd. of Educ.*, 373 F. Supp. 394, 396 (D. Md. 1974), *aff'd on other grounds*, 520 F.2d 871 (4th Cir.), *cert. denied*, 423 U.S. 1034 (1975) (under *American Pipe*, § 1983 class action tolled limitations period for all class members). In the instant case, though, there is no discernible state rule. Moreover, Puerto Rico has modeled its class action procedure, P.R. Laws Ann. tit. 32, App. II, R. 20.1, on the federal class action procedure. *Caguas Lumber Yard, Inc.* v. *Superior Court*, 96 P.R.R. 826, 830 (1969). Because the decision in *American Pipe* that unnamed class members could take advantage of the tolling effect of a pending class action was based on an interpretation of the federal class action rule, Fed.R.Civ.P. 23(a), *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 550-52, we believe that this reasoning would also be applied in determining the relationship between class actions and tolling rules in Puerto Rico. We conclude that named and unnamed plaintiffs may benefit from the tolling effect of a class action, if class certification is later denied on grounds of lack of numerosity. *Cf. id.* at 552-53.

This conclusion answers only half of the question. The issue remains whether *American Pipe* or other reasons require that unnamed class members gain the benefit only of suspension of the running of the limitations period, notwithstanding the Puerto Rican rule that the statute starts to run anew under similar circumstances. In *American Pipe*, the pendency of the class action suspended the running of the limitations period because the statute providing the underlying cause of action, section 5(b) of the Clayton Act, provided for suspension where the government filed suit under the statute. *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. at 560-61. In this case, neither § 1983 nor any of the related Civil Rights Acts provisions suggest the precise effect that commencement of a class action or any other action should have. It is true that "in the American

common law generally, prior judicial actions do not toll the statute of limitations, no matter how close their relationship to the one at bar." *Ramirez de Arellano* v. *Alvarez de Choudens*, 575 F.2d at 319 (citations omitted). Puerto Rico has not adopted the American common law, however, and we see no reason not to apply its running-anew rule to unnamed plaintiffs. None of the parties has pressed on us an argument that the federal policies underlying § 1983 require a particular result here, *see Board of Regents* v. *Tomanio*, 446 U.S. at 485-86, and we can discern no particularly strong policies implicated. Two policies often associated with § 1983 and tolling rules are those of repose and federalism. *See Williams* v. *Walsh*, 558 F.2d 667, 674-75 (2d Cir. 1977). In this case, the class action—assuming that it itself was timely filed, a matter we discuss below—did not disturb any protected repose defendants enjoyed with respect to § 1983 claims, and commencement of a new limitations period after the pendency of the class action would not interrupt any further repose. In addition, defendants are Puerto Rican, and there is no unfair surprise in following Puerto Rican law. The policy of federalism also appears to be well served: Puerto Rican law is permitted its fullest effect without any visibly adverse impact on federal rights. We hold, therefore, that a class action asserting a § 1983 claim tolls the Puerto Rican statute of limitations during the pendency of the class action for all purported class members and that when class certification is denied for lack of numerosity, the limitations period begins to run anew.

The Retroactivity of Delaware State College *v.* Ricks

We now turn to the two remaining arguments on tolling, keeping in mind that the one-year statute of limitations was tolled by the filing of the class action on June 19, 1978, and started running anew when the class certification was denied on August 21, 1978. Success on the contention that the Supreme Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250, should not be applied retroactively would save all suits, so we now examine that. Defendants in *Fumero Soto* argue that the decision in *Chardon* v. *Rivera Fernandez*, 50

U.S.L.W. 3341, controls this issue and requires retroactivity because the facts in that group of cases involved the same alleged incidents of political discrimination as the *Fumero Soto* cases do. Nothing is said in the *Rivera Fernandez* opinion regarding retroactivity.[7] We do not think that the retroactivity question is therefore foreclosed.

The application of nonretroactivity depends on an evaluation of

> three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g.*, *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, [392 U.S. 481,] 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g.*, *Allen* v. *State Board of Elections*, [939 U.S. 544,] 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, [381 U.S. 618,] 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, [395 U.S. 701,] 706.

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[7] In further asserting the conclusive effect of *Rivera Fernandez*, defendants argue that the Supreme Court denied the *Rivera Fernandez* plaintiffs' petition for rehearing, which raised the nonretroactivity issue. Defendants' argument is utterly without merit because surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none. *See Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari).

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-07 (1971). *See Aufiero* v. *Clarke*, 639 F.2d 49, 51 (1st Cir.), *cert. denied*, 452 U.S. 917 (1981). In analyzing *Chevron Oil's* first factor, plaintiffs direct us to several cases purportedly standing for the proposition that a § 1983 cause of action accrues when plaintiff is actually demoted or terminated. The weight of authority is far less than plaintiffs suggest. One of the cases cited stands essentially for the *Ricks* rule of accrual rather than for plaintiffs' asserted rule, *NLRB* v. *California School of Professional Psychology*, 583 F.2d 1099, 1101-02 (9th Cir. 1978) (applying § 10(b) of National Labor Relations Act); *accord*, *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 882 (2d Cir. 1977), three cited cases stand equally well for the *Ricks* rule as for plaintiffs' rule, *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) (Age Discrimination in Employment Act); *Payne* v. *Crane Co.*, 560 F.2d 198, 199 (5th Cir. 1977) (per curiam) (same Act); *Fitzgerald* v. *Seamans*, 553 F.2d 220, 226-31 (D.C. Cir. 1977) (42 U.S.C. § 1985(3)), two are at best suggestive of plaintiffs' proposition, as we observed in *Rivera Fernandez* v. *Chardon*, 648 F.2d at 768, *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) (Age Discrimination in Employment Act); *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 95 (8th Cir. 1975) (same Act), and only one offers square support for plaintiffs' rule, *Egelston* v. *State Univ. College at Geneseo*, 535 F.2d 752, 755 (2d Cir. 1976) (Title VII). Moreover, despite the Second Circuit's decision in *Egelston*, the Fourth Circuit reached a contrary conclusion in December, 1977, *Bireline* v. *Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979). It is true that, as of the summer of 1977, little law existed regarding the accrual date of a § 1983 cause of action, but the one established principle was that a civil rights cause of action accrued when plaintiff knew or had reason to know of his or her injury, *see, e.g.*, *Cox* v. *Stanton*, 529 F.2d 47, 50 (4th Cir. 1975); 1 C. Antieau, Federal Civil Rights Acts § 241, at 412 (2d ed. 1980),

which could support either the *Ricks* rule or plaintiffs' rule.* We cannot say that *Ricks* established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression. *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106.

The second factor bearing on nonretroactivity involves examining " 'the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' " *Chevron Oil Co.* v. *Huson*, 404 U.S. at 107, quoting *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965). *Linkletter* restated the inquiry as one into the purpose of the new rule, reliance placed on the old rule, and the effect of retroactivity on the administration of justice, *Linkletter* v. *Walker*, 381 U.S. at 636. The inquiry has also been construed more simply as the last clause of the *Chevron Oil* factor: whether retroactive application will further or retard operation of the rule, *Wiltshire* v. *Standard Oil Co.*, 652 F.2d 837, 841 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3766 (Mar. 22, 1982). However stated, this test for the retroactivity of a rule of law requires an explanation of the purposes of the new rule and consideration of its impact on the prior law, which thereby make this test dependent on the first factor: the less (or the less clear) prior law, the less adverse impact there would be, and this would militate against retroactivity. The accrual rule of *Ricks* seems to promote more strongly the policy of repose that underlies the applicable state statute of limitations. The policy of repose is that a defendant can be expected to defend a suit

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* This observation relates to the question whether in a retroactivity analysis, we should focus on the state of the law at the time the claim arose, *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 347 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), or on the state of the law when the new decision comes out. We intimate no views on whether we agree with *Wachovia Bank*. That opinion would provide a stricter test for retroactivity here; we think that under *Wachovia* the "new" law was clear at the time plaintiffs' claims arose.

only for a certain period after the act complained of. The period of susceptibility to suit should begin when the defendant is first aware (or should be aware) of facts that give rise to the concrete possibility of suit. A competing policy is that a limitations period should not begin to run against a plaintiff until he is or should be aware of the actionable conduct. Under *Ricks* these policies are reconciled as follows: the crux of a § 1983 action is a discriminatory act, and in an employment case, this act occurs—and the limitations period begins to run—when notice of termination or demotion is given, not when the firing or demotion actually takes effect. Retroactive application of *Ricks* would give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue. Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require nonretroactivity.

We might still find retroactivity barred if it would produce substantially inequitable results, the third *Chevron Oil* factor. This factor reflects concern that a plaintiff not be accused of "sleeping on his rights" when he could not have known of restrictions on his rights, *Chevron Oil Co.* v. *Huson*, 404 U.S. at 108, and that injustice or hardship not be caused, *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam). The equities that the *Fumero Soto* plaintiffs rely on are their day in court to vindicate their right to freedom from political discrimination, the existing jury finding of liability on the part of the defendants, and the expenses already incurred at trial. Neither group of plaintiffs advance any reason, however, as to why they waited so long before filing suit, thereby risking a time bar if the date of notice of demotion were to become the accrual date. The then-existing law was not at all clear on this point. The right plaintiffs seek to enforce is not so important that limitations periods should be disregarded. The expenditure of time and energy in the *Fumero Soto* case is

regrettable, but the limitations problem had been recognized before the case was tried on its merits. We are unpersuaded that equity requires *Ricks* to be applied prospectively only, and we hold that *Ricks* applies retroactively.

The Tolling Effect of the Letters of Protest

We now turn to the argument that letters sent by the plaintiffs in both cases to Chardon and the Department of Education protesting their demotions constituted "extrajudicial claim[s] of the creditor[s]" within the meaning of P.R. Laws Ann. tit. 31, § 5303, which thereby tolled the limitations period and caused it to run anew. We have held that such extrajudicial claims must be "precise and specific" in order to have this desired tolling effect. *Gual Morales* v. *Hernandez Vega*, 604 F.2d 730, 733 (1st Cir. 1979), citing *Jimenez* v. *District Court*, 65 P.R.R. 35, 42 (1945). A proper extrajudicial claim must seek the same relief ultimately sought in the subsequent lawsuit. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d 321, 323-24 (1st Cir. 1978). Plaintiffs believe that their protest letters satisfied these conditions. If they do not, however, they urge us to reconsider *Gual Morales* and *Hernandez del Valle* for the following three reasons: the Supreme Court's recent decision in *Board of Regents* v. *Tomanio*, 446 U.S. 478, requires modification of our decisions; Puerto Rican law treats "extrajudicial claim" more liberally than do our decisions; and *Hernandez del Valle* erroneously used federal law in construing "extrajudicial claim" restrictively. Alternatively, they request that we certifiy to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters.

The *Rivera Fernandez* and *Fumero Soto* plaintiffs sent virtually identical letters of protest to Chardon in which each plaintiff acknowledged receipt of his demotion letter, stated his disagreement with the decision, informed Chardon that he had sent a copy of the demotion letter to the Puerto Rico Teachers Association to take appropriate action, and said he would obey the order.[8] These letters did not make a "precise

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[8] See footnote 2 for the verbatim text of the letters.

and specific" claim for the relief ultimately sought. The plaintiffs later sought reinstatement, back pay, actual and punitive damages, costs and attorney's fees, and a permanent injunction against defendants from any further acts of political discrimination. None of these claims were asserted in the letters; the letters allude only to necessary legal action. This warning does not serve the purpose of a "precise and specific" claim, alerting defendants to still-live claims that would otherwise lapse. These letters are in the nature of a mere reminder, not a claim, *see Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. ___ (1980), and do not come within § 5303.[9]

We also decline the invitation to reconsider *Gual Morales* and *Hernandez del Valle*. The three reasons advanced for reconsideration tend to merge. The first reason, the *Tomanio* case, which held that state tolling law applies to the state statute-of-limitations questions that arise in a § 1983 case, is said to require reconsideration because our earlier decisions incorrectly interpreted Puerto Rican law—the second reason for reconsideration—and because those decisions improperly took federal law into account—the third reason. We cannot and do not, of course, dispute *Tomanio*, but we do not believe that *Gual Morales* and *Hernandez del Valle* violated its guidelines. Puerto Rican law does not, contrary to the plaintiffs' assertions, require a wider construction of "extrajudicial claim." Our decision in *Hernandez del Valle* relied on two Commonwealth Supreme Court cases and one federal district court case from Puerto Rico. *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24. In addition, the Puerto Rico Supreme Court recently observed that, because the "extrajudicial claim" provision of § 5303 constituted an exception to the extinguishment of actions, it should be construed narrowly. *Diaz de Diana* v. *A.J.A.S. Ins. Co.*, ___ P.R.R. at ___ & n.1. The commenta-

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[9] We have no occasion to consider defendant Ramos' contention that, because the letters were sent to Chardon at the Department of Education, Ramos never received them so that they could not in any event constitute extrajudicial claims as to him.

tors cited by plaintiffs, Diez-Picazo, La Prescripcion En El Codigo Civil 93-95, 130-31; 12 Manresa, Codigo Civil 1242-43 (1973), do not appear to urge a different interpretation. Diez-Picazo does state (in translation) that no particular form is required for an extrajudicial claim but goes on to discuss summonses, letters, and oral claims, matters of form not at issue here. We do not think that we have construed Puerto Rican law improperly.

Nor has federal law been read erroneously into § 5303. Plaintiffs object in particular to a passage in *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323, that states that expansion of "extrajudicial claim" beyond interpretations given by courts in Puerto Rico would undermine the policy of repose underlying statutes of limitation. Plaintiffs' argument is essentially that "policy of repose" is a common law concept that cannot be used in construing the civil code. The commentary concerning tolling that is cited by plaintiffs, Diez-Picazo, *supra*, and Manresa, *supra*, is certainly not inconsistent with the policy of repose, but in any case, it is clear that our decisions in *Hernandez del Valle* and *Gual Morales* rested primarily on a fair reading of Puerto Rican decisions. *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 733; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 223-24. Plaintiffs also refer us to *Miller* v. *Smith*, 625 F.2d 43 (5th Cir. 1980) (per curiam), and *Brown* v. *Bigger*, 622 F.2d 1025 (10th Cir. 1980) (per curiam), for support for their position here. *Miller* simply reversed and remanded for reconsideration in light of *Tomanio*, a decision with which we already conform; *Brown* v. *Bigger* is to similar effect and does not persuade us to alter our conclusion.

The plaintiffs ask us alternatively to certify to the Puerto Rico Supreme Court the question of the tolling effect of the protest letters. Certification is a matter within the discretion of the court. *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). It is particularly appropriate where a novel and unsettled question of state law is involved, and where the judges on the federal bench are geographically distant from that state or are otherwise unfamiliar with its law. *See id.* at 391; *Gual Morales*

v. *Hernandez Vega*, 604 F.2d at 732-33; *Ruiz Rodriguez* v. *Litton Industries Leasing Corp.*, 574 F.2d 44, 46 (1st Cir. 1978). Among other functions, certification is meant to save "time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. at 391.

The cases at bar do not involve a matter of first impression in Puerto Rican law, *cf. Hendrickson* v. *Sears*, 495 F.2d 513, 514 (1st Cir. 1974) (per curiam) (certification of "question of first impression in Massachusetts law"); *Bose Corp.* v. *Consumers Union, Inc.*, 384 F. Supp. 600, 603 (D. Mass. 1974) (same), nor an issue where the law is unsettled, *cf. Hiram Ricker & Sons* v. *Students Internat'l Meditation Soc'y*, 501 F.2d 550, 557-58 n.16 (1st Cir. 1974) (certification where extension of prior Maine decisions was uncertain). The principle that an "extrajudicial claim" must be "precise and specific," *Jiminez* v. *District Court*, 65 P.R.R. at 42, that it must seek the same relief later sought in court, *Gual Morales* v. *Hernandez Vega*, 604 F.2d at 732-33; *Hernandez del Valle* v. *Santa Aponte*, 575 F.2d at 323-24, has already been clearly laid down. We decline, therefore, to certify the issue to the Puerto Rico Supreme Court. *See Daigle* v. *Hall*, 564 F.2d 884, 886 (1st Cir. 1977) ("not particularly difficult" issue of state law does not require certification); *Oppenheimer Mendez* v. *Acevedo*, 512 F.2d 1373, 1375 (1st Cir. 1975) (where Puerto Rico law is clear, certification would be "hollow formality"). In every case, certification would help "build a cooperative judicial federalism," *Lehman Bros.* v. *Schein*, 416 U.S. at 391, by deferring to state courts, but the waste of time and energy in certifying the issue of "extrajudicial claim" here would be too great, *see id.*

Our ruling that the Ortiz Rivera class action tolled the statute of limitations during its pendency and caused it to run anew means that those *Fumero Soto* plaintiffs who received notice of termination within one year before the class action was filed, that is, after June 19, 1977, are not time-barred. The date of notice of termination is the triggering date under *Ricks* and *Rivera Fernandez*, not the protest letters. The *Fumero Soto* plaintiffs who received notice of termination before June 19,

1977, are time-barred. All the *Rivera Fernandez* plaintiffs received notice prior to June 19, 1977, and all those cases are time-barred.

The Verdict and the Subsequent Order of the District Court

There are four issues pertaining to the *Fumero Soto* plaintiffs who are not time-barred: whether the district court should have granted defendants' motion for judgment notwithstanding the verdict, Fed.R.Civ.P. 50(b); whether the general verdict should have been set aside because the answers to the special interrogatories were inconsistent with it, Fed.R. Civ.P. 49(b); whether the court erred in ordering the Commonwealth to make payments of back pay to plaintiffs; and whether the court erred in holding that the individual defendants should not pay damages.

To determine the sufficiency of the evidence, it is necessary first to set out the law concerning § 1983 liability. Liability may be grounded on negligence alone. *Parratt* v. *Taylor*, 451 U.S. 527, 532-35 (1981).

> Accordingly, in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Id. at 535. The first element raises several issues, among them whether there is a sufficient causal connection between defendant's acts and the alleged injury. There is also a related, though strictly extraneous issue, whether defendant enjoys immunity from damages, which we discuss below concerning the remedy in the instant cases. With respect to causality, there usually must be an affirmative link between acts of misconduct and plans or policies promulgated by the defendant, *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976); defendant must commit the constitutional tort himself or "cause" another to

commit the tort, *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 692 (1978). Defendant will be liable for failures to meet his statutory responsibilities that amount to constitutional violations, *DiMarzo* v. *Cahill*, 575 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 439 U.S. 927 (1978), and actual knowledge of the resulting violations is unnecessary. *Id.* at 18 & n.3; *Tatum* v. *Houser*, 642 F.2d 253, 254 (8th Cir. 1981) (per curiam). Plaintiff may prove that defendant was derelict in supervising a subordinate whose acts caused constitutional injury. Such supervisory liability is ill-defined. *See Naughton* v. *Bevilacqua*, 605 F.2d 586, 589 (1st Cir. 1979). A superior will not be liable for undirected, sporadic acts of subordinates, *Layne* v. *Vinzant*, 657 F.2d 468, 471 & n.3 (1st Cir. 1981), but he will be liable where violations are so pervasive that a dutiful supervisor would have notice of them, *Naughton* v. *Bevilacqua*, 605 F.2d at 589. Mere failure to supervise is not a basis for liability under § 1983, *Owens* v. *Haas*, 601 F.2d 1242, 1246 (2d Cir. 1979), citing *Rizzo* v. *Goode*, 423 U.S. 362, but if delinquent supervision is so severe as to amount to gross negligence or deliberate indiffernce to constitutional violations, then liability will result, *Owens* v. *Haas*, 601 F.2d at 1246. "Section 1983 will not support a claim based on a *respondeat superior* theory of liability. *Monell* v. *Department of Social Services*, 436 U.S. 658, 694 (1978)." *Polk County* v. *Dodson*, 50 U.S.L.W. 4077, 4080 (Dec. 14, 1981).

The evidence, viewed in the light most favorable to the plaintiffs, showed the following. In early May, 1977, a memorandum was sent out over the signature of Virginia Belaval, an assistant to Chardon, to undersecretaries, deputy secretaries, and regional directors in the Department, informing them that nonpermanent positions in the Department would be filled by competition for the 1977-78 school year and that recommendations for retaining current nonpermanent employees should be sent with "appropriate justifications." Ramos and others actually prepared the memorandum, basing it on similar memoranda sent out at this time in earlier years. Chardon saw the memorandum and discussed it with Belaval. Some

recommendations were received. At the end of May, Ramos ordered Julio Cintron Lopez to sign letters of demotion that were going to "clean out" members of the PDP in temporary positions. Cintron Lopez resisted but eventually complied; thereafter he was excluded from activities in the Department. At some point, probably in the summer, Chardon saw some of the letters. The letters had the desired, cleaning-out effect: the demoted plaintiffs were members of the PDP or unaffiliated with the NPP; they were replaced by NPP members. In particular, one regional director told Jose Surillo Rodriguez that he was being demoted because the NPP wanted to place its own member in his position but that Surillo Rodriguez could seek reappointment if he were willing to cooperate with the NPP. When the demoted teachers returned protest letters, Belaval heard their complaints, conducted brief investigations, and discussed some cases with Chardon. Chardon instructed Belaval, however, that unless she could persuade the regional directors to change their recommendations, their decisions would stand. At some time during his tenure as Secretary, Chardon spoke to a group of deputy superintendents and school principals. He was asked about the changes and demotions that had occurred in the Department, and he remarked that the PDP had left a great many "vacuums" or vacancies and that the NPP would take care that PDP members would not fill them. Chardon testified that he was referring only to 300 school director positions that were truly vacant at the time.[10]

This evidence is less than overwhelming, but we believe that it was sufficient to enable the jury to conclude that Chardon and Ramos had the necessary causal connection—or, as Chardon and Ramos put it, "personal involvement"—with the demotions to render themselves liable. Chardon is the more

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[10] Plaintiffs argue incorrectly that evidence available to the jury included defense counsel's "concession" that certain testimony "tied Chardon . . . into the personal involvement pattern." Statements of counsel are not evidence; plaintiffs' more egregious error is that the jury was not in the courtroom at the time the statement was made.

difficult case. He testified about his inability to control employees of the Department, and there was evidence about the Department's "decentralization policy:" accepting the decisions of local (and otherwise inferior) officials as final. The critical evidence was Chardon's statement that the NPP would keep the PDP out of Department positions; the jury was entitled to credit Rivera Fernandez's testimony over Chardon's about the statement. From this, the jury could have concluded that Chardon avoided making changes in or interfering with the Department activities that, under the prevailing policies, he knew would operate to demote employees on the basis of their political affiliation. *See Rizzo* v. *Goode*, 423 U.S. at 371 (need for affirmative link between misconduct and policies implemented by defendants). This is not a case of "the mere right to control without any control or direction having been exercised and without any failure to supervise." *Monell* v. *Department of Social Servs.*, 436 U.S. at 694 n.58.

The case against Ramos is stronger: he took charge of dispatching the demotion letters that he knew would "clean out" PDP members. The jury could have characterized his conduct as an act that directly caused constitutional injury to the plaintiffs.

We affirm the district court's denial of defendants' motion for judgment notwithstanding the verdict.

The next issue, the alleged inconsistency between the answers to the special interrogatories and the general verdict, requires an examination of the court's instructions to the jury. We have no difficulty with the instructions, to which no objections were made. It is necessary, however, to restate certain sections of the charge in order to understand the inconsistency claim and our ruling on damages.

The district court instructed the jury that one of the essential facts plaintiffs had to prove was

> that the defendant demoted him from the position that he held during the '76-'77 school year because of his political affiliation and of his activity in the affairs of the Popular

> Democratic Party or the—a political party other than the NPP.
>
> In other words, that plaintiff's political affiliation or activity in the affairs of his party was a substantial and/or motivating factor in the defendant's decision to demote him back to his permanent status[.]

On the question of immunity, the court instructed:

> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or* if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers. (emphasis added).

After the case was submitted to the jury, there was a lengthy discussion between the court and counsel as to how damages would be handled if the jury found liability. The court was concerned because "we have got 55 cases, and it is beyond physical endurance for that same jury to come back and try 55 damage trials." During the discussion, the court opined "that there must be a finding of malicious intention to justify punitive damages." Counsel ultimately agreed, with the court's approval, that in the event the jury found defendants liable "that a new or second jury can be summoned to try the respective damages claims." The record does not disclose any discussion of special interrogatories.

After the general verdict was received, the court told the jury that it wanted it to determine "whether or not these acts were done with a malicious intent." It then defined malicious intent:

> Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent.
>
> Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification.

The jury was then told to answer the following question as to each defendant. "Did the defendant have a malicious intent to deprive plaintiffs of their constitutional or other rights?" There was no objection. The jury answered in the negative as to both defendants and was then discharged. Immediately after the jury left, counsel for the defendants moved for judgment notwithstanding the verdict "pursuant to Federal Rule 52(b)" on the ground that the special findings contradicted the general verdict.

It is Federal Rule of Civil Procedure 49(b) that covers the problem of inconsistencies between special interrogatories and the general verdict. Federal Rule of Civil Procedure 52(b) applies only where findings are made by the court in the first instance. The use of special interrogatories should have put counsel on notice that the provisions of Federal Rule of Civil Procedure 49 applied. Under Rule 49(b),[11] objections to the inconsistency of verdicts must be made before the jury is discharged or by motion to resubmit to the jury. *Skillen* v. *Kimball*, 643 F.2d 19, 19-20 (1st Cir. 1981); *see Stancill* v. *McKenzie Tank Lines, Inc.*, 497 F.2d 529, 534-35 (5th Cir. 1974); *Ludwig* v. *Marion Laboratories, Inc.*, 465 F.2d 114, 118 (8th Cir. 1972); *Barnes* v. *Brown*, 430 F.2d 578, 580 (7th Cir. 1970). The purpose of the rule is plain: to promote the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for a new presentation of evidence to a different body. *Skillen* v. *Kimball*, 643 F.2d at 20. In the case at bar, counsel waited until after the jury was excused before raising the inconsistency claim. Defendants

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[11] Fed.R.Civ.P. 49(b) provides in pertinent part as follows:

General Verdict Accompanied by Answer to Interrogatories.

. . . When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

have, therefore, waived their right to have the general verdict set aside on this ground.

Even had defendants not waived their inconsistency claim, we would agree with the district court that the general verdict and the answers to the special interrogatories were not inconsistent. It is clear from reading the record that the district court submitted these questions to determine if punitive damages should be awarded. As the district court pointed out in its lengthy post-trial memorandum, the jury could have based its general verdict of liability on the ground that the defendants knew or should have known that their actions would violate the constitutional or legal rights of the teachers *or* that they acted with malicious intent. Immunity Instruction, *supra*, at 25. We agree with the district court that the only effect of the answers to the special interrogatories was to rule out punitive damages.

We now come to the post-trial order of the district court. In rejecting defendants' motion for judgment notwithstanding the verdict, the court issued two orders. It directed the Department of Education of the Commonwealth to reinstate all plaintiffs to the positions held at the time of their demotions. This order has neither been briefed nor argued on appeal. The court also ordered the Department of Education to pay all plaintiffs full back pay. The court then ruled that "as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs." Although we can understand the court's desire to dispatch the case in one fell swoop, we think the ruling was erroneous.

We turn first to the back pay award: whether the Commonwealth could be liable for it.[12] We are guided in answering the

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[12] The district court denied defendants' motion to amend the judgment by vacating or rescinding the back pay award on the ground that the motion was untimely. We are not, however, foreclosed from considering defendants' attack on the judgment. *See Evans* v. *Suntreat Growers & Shippers, Inc.*, 531 F.2d 568, 570 (Temp. Emer. Ct. App. 1976).

first question by P.R. Laws Ann. tit. 32, § 3085, which provides as follows:

> Every official, ex-official, employee or ex-employee of the Commonwealth of Puerto Rico who is sued for damages in his personal capacity, when the cause of action is based on alleged violations of the plaintiff's civil rights, due to acts or omissions committed in good faith, in the course of his employment and within the scope of his functions, may request the Commonwealth of Puerto Rico to provide him with legal representation, and to subsequently assume the payment of any judgment that may be entered against his person. Executive Directors, ex-Executive Directors, members and ex-members of the Governing Boards of public corporations and Government instrumentalities, mayors and ex-mayors shall be covered by these provisions, except that for the payment of judgments, they shall be governed by the provisions of section 3092 of this title. Any action brought under the provisions of sections 3077-3084 of this title shall not be covered by the provisions of this section.
>
> Likewise, these provisions shall not be construed, for any reason whatsoever, as making the Commonwealth an insurer of the aforesaid public services, nor as a waiver of the sovereign immunity of the Commonwealth.

Puerto Rico not having waived its sovereign immunity, the award against its Department of Education cannot stand.[13] In a § 1983 action, "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974). *See Quern* v. *Jordan*, 440 U.S. 332, 341 (1979); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1976). The district court concluded that the back pay award in the *Fumero Soto* cases was nevertheless permissible because it was "ancillary" to the prospec-

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[13] The Commonwealth enjoys the full benefits of the eleventh amendment. *Ezratty* v. *Commonwealth of Puerto Rico*, 648 F.2d 770, 776 n.7 (1st Cir. 1981).

tive relief of reinstatement. We cannot agree. The back pay and reinstatement remedies are entirely distinct; indeed, plaintiffs no longer with the Department of Education and not reinstated were held entitled to back pay. It is plainly retroactive relief requiring the payment of funds from the state treasury. Moreover, "ancillary" monetary relief that is appropriate against a state, *Quern* v. *Jordan*, 440 U.S. at 337, is far different from the relationship between back pay awards and other equitable relief that justifies a grant of back pay against bodies that do not enjoy sovereign immunity, *see Gurmankin* v. *Costanzo*, 626 F.2d 1115, 1121-22 (3d Cir. 1980), *cert. denied*, 450 U.S. 923 (1981) (approving back pay award as part of remedy in § 1983 and Title VII case) and cases cited therein. It was on this second, looser relationsip that the district court erroneously relied.

Plaintiffs argue that the eleventh amendment proscription does not apply where a state may use federal funds to pay damages. The cases cited are instances where the state could seek reimbursement from the federal government, *Harrington* v. *Blum*, 483 F. Supp. 1015, 1021-22 (S.D.N.Y. 1979), *aff'd*, 639 F.2d 768 (2d Cir. 1980), where a back pay award is at issue and the state job position was federally funded, *Witter* v. *Pennsylvania Nat'l Guard*, 462 F. Supp. 299, 306 n.9 (E.D. Pa. 1978), or where state funds are held in a separate account for an historical society and an award limited to those funds will not affect the state's budgetary decisions, *Morrow* v. *Sudler*, 502 F. Supp. 1200, 1203-04 (D. Colo. 1980). These decisions are arguably sound: where the state will be unaffected by an award, its consent to suit and waiver of sovereign immunity seem unnecessary. These decisions, however, do not reach the instant cases where plaintiffs show that at most state and federal funds are intermingled. *Cf. Florida Dep't of Health & Rehabilitation Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (state participation in federally funded public aid program does not amount to waiver of sovereign immunity). The Commonwealth here cannot avoid using state funds to pay the award, and its budget will be

affected. We, therefore, hold the back pay award against the Department of Education barred by the eleventh amendment.

The final issue is the court's ruling that because of the jury finding of lack of malicious intent, plaintiffs were not entitled to any damages from Chardon and Ramos. Unlike most civil rights damage cases, the individual defendants here never asserted a good faith defense. Their defense was that the demotions were for nonpolitical reasons. The district court pointed this out in its post-trial memorandum, and our review of the record confirms its finding. There is, therefore, no question of immunity, absolute or qualified, to be considered. We think the district court's ruling that lack of malice precluded compensatory damages was incorrect. the instructions to the jury, already quoted, and its general verdict rendered the defendants liable for compensatory damages. In *Wood* v. *Strickland*, 420 U.S. 308 (1975), the seminal § 1983 civil rights case on damages against individual defendants, the Court held:

> [T]he appropriate [immunity] standard necessarily contains elements of both ["objective" and "subjective" good faith]. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

Id. at 321.

Here, the defense was neither good faith nor ignorance; defendants simply claimed that they did not violate the law. The jury found otherwise. Compensatory damages follow as a matter of course. Denial of punitive damages because of lack of malicious intent is no bar to liability for compensatory damages on the part of defendants who cannot survive the "ignorance or disregard" prong of the *Wood* test. *Cf. Morris* v. *Travisono*, 528 F.2d 856, 857 (1st Cir. 1976) (noting unappealed award of compensatory damages against three defendants but punitive damages against only two); *Smith* v. *Losee*, 485 F.2d 334, 344 (10th Cir. 1973) (en banc), *cert. denied*, 417 U.S. 908 (1974)

(defendant indirectly responsible for political discrimination by other defendants against plaintiff is liable for actual damages but not for punitive damages); *Stolberg* v. *Members of Bd. of Trustees for State Colleges*, 474 F.2d 485, 489 (2d Cir. 1973) (actual but not punitive damages awarded in political discrimination case); *Aumiller* v. *University of Delaware*, 434 F. Supp. 1273, 1311-12 (D. Del. 1977) (against defendant official who cannot invoke qualified immunity plaintiff must still prove malice or wanton disregard of constitutional rights in order to recover punitive damages).

The *Fumero Soto* cases not time-barred must be remanded for a jury trial on compensatory damages.

Summary

In Nos. 80-1237, et al., *Rafael Rivera Fernandez et al.* v. *Chardon, et al.*, the judgments are vacated and all the cases are remanded to the district court with instructions to dismiss.*

In Nos. 81-1567 and 81-1607, *Juan Fumero Soto, et al.* v. *Chardon, et al.*, the liability judgment in favor of those plaintiffs who received letters of notice of demotion after June 19, 1977, is affirmed and the matter is remanded for assessment of compensatory damages against the individual defendants, Chardon and Ramos. This is a jury determination unless the parties agree otherwise. The judgment in the cases in which the plaintiffs received letters of demotion prior to June 19, 1977, is reversed and the matter is remanded with instructions to dismiss.

No costs to any party.

Judgments accordingly.

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* Judges Campbell and Breyer, not having participated in 81-1567 and 81-1607, join in only so much of the opinion as relates to 80-1237.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 79-198

JUAN FUMERO SOTO,

Plaintiff,

v.

CARLOS CHARDON, *et al.*,

Defendants.

FINAL ORDER AND JUDGMENT

On May 12, 1981, this Court entered an extensive order directing that plaintiff educators be reinstated to their previous positions in the Puerto Rican school system, and that back pay awards be computed to make plaintiffs whole. After delays caused by defendants' inability to provide this Court with the necessary information in a timely fashion, the Court is now ready to rule on the back pay issue. In 48 of the 55 consolidated cases, the parties have agreed to the proper measure of compensation. Pursuant to the terms of the May order, the Court now orders defendants to pay each plaintiff the amounts agreed upon.

CASE NO.	NAME	AMOUNT
78-1156	Jose Ortiz Rivera	$6,000.00
79-67	Syraida Rosa Cardona	$8,400.00
79-70	Carmen L. Negron Marin	$1,800.00
79-72	Aida Rodriguez Rios	$2,450.00
79-73	Carmen H. Montes Velez	$1,818.75
79-74	Carmen Garcia Rosado	$4,545.56

79-76	Noelia Torres de Cantres	$8,332.76
79-82	Iraida Sanchez Marquez	$6,000.00
79-83	Antonio Rodriguez Rivera	$ 720.00
79-85	Edda I. De Ayala Lafuente	$ 196.48
79-167	Josefa Marrero Ayala	No back pay
79-169	Nilsa Cardona Flores	$3,600.00
79-170	Jose A. Alvarado	$3,120.00
79-176	Elba M. Colon Torres	$1,837.50
79-179	Carmen Ortiz Lemois	$7,200.00
79-182	Andres A. Hernandez Ortiz	$4,345.00
79-183	Aurora Sierra Pizarro	$ 375.00
79-185	Virginia Otero Arroyo	$4,350.00
79-194	Maria V. Pagan Seda	$1,300.00
79-197	Ana Mercedes Ortiz Colon	$7,175.00
79-198	Juan Fumero Soto	$1,920.00
79-199	Dora Castro de Aguilar	$3,600.00
79-200	Antonio Vega Ortiz	$ 300.00
79-203	Jose A. Surillo Rodriguez	$1,571.71
79-206	Reinaldo Rodriguez Solivan	$9,120.00
79-209	Sylvia M. Denis	$6,000.00
79-210	Bienvenido Castro Del Valle	$7,200.00
79-212	Kremlly Rodriguez Valentin	$2,450.00
79-213	Elba Rosario de Bravo	$ 520.00
79-215	Lydia Munoz Morales	$ 710.00
79-218	Angel Luis Marrero Gonzalez	$1,570.04
79-219	Ramon Norat Zayas	$2,050.00
79-220	Charles H. Quiles Mariani	No back pay
79-221	Carmen T. Lugo Sotero	$ 112.50

79-224	Iris Camelia Velez Morales	$5,340.00
79-227	Jorge O. Principe Galarza	$3,600.00
79-323	Santiago Gonzalez Velazquez	$1,084.96
79-325	Bienvenido Rivera Diaz	$1,200.00
79-330	Angela Colon Santiago	$2,400.00
79-332	Joaquin Cruz Mendez	$2,400.00
79-333	Ursula Aguilar Quintero	$8,400.00
79-334	Aminta Rivera Cardonna	No back pay
79-335	Roberto Cruz Cruz	$1,920.00
79-336	Nelson Velez Quinones	$2,450.00
79-357	Cristina Cancel Cuevas	$1,200.00
79-358	Maria D. Guerra Navarro	$2,400.00
79-361	Francisco Bonilla Ocasio	No back pay
79-362	Heriberto Gallardo Gutierrez	No back pay

In seven (7) cases, the parties have not been able to agree. In two of these cases, 79-79, Efrain Tacoronte Ruiz, and 79-326, Carmen M. Morales Hernandez, the disputes are apparently only upon the proper figure involved, and the differences are comparatively minor. While the Court will not enter a final back pay figure in these two cases without further consultation with counsel, these two plaintiffs are to be granted the reinstatement relief set out in the May order.

Despite the two month period granted to gather information, in one case, 79-66, Carmen Nunez Rivera, defendants have indicated they are uncertain as to her status. The defendants are directed to immediately ascertain whether the suggested back pay figure of $3,600 is correct. If it is, then she should be accorded the same relief as the 48 other cases. Should the defendants continue to disagree as to the amount of back pay, they are directed to promptly notify this Court of that fact and the basis of their disagreement. This plaintiff is to be

accorded the same reinstatement relief as the plaintiffs which have already been discussed.

In 79-164, plaintiff Jose E. Aponte De la Torre claims he was demoted from a position as Vocational Director III to teacher of Industrial Arts. It is ordered that he be reinstated according to the terms of the May order to his former position. The remainder of that case regarding his claim that demotion from one position caused the loss of another part-time position and further damages will require further consultation.

Inasmuch as the pay discrepancy is quite large, the Court will entertain further proceedings to deal with this problem.

Similarly, there are polar differences between the parties' position regarding Nos. 79-329, Juan Rivera Pagan, 79-364, Julio E. Colon, and 79-188, Carmen D. Perez Roman. These plaintiffs contend they were not demoted but dismissed, and have consequently far greater damages. Defendants admit the dismissals, but contend they are unrelated to the political problems found in the main consolidated cases. All relief, monetary and reinstatement, will be stayed in these cases pending further proceedings.

Final judgments will be entered in accordance with the foregoing terms of this order in accordance with F.R.C.P. 54(b).

Filing this order, along with the contemporaneous filing of an order dismissing defendants' final motion to overturn the Court's May 12 order, largely concludes the lengthy and protracted proceedings in these cases. This Court takes the opportunity to reiterate that the reinstatement relief ordered in May is to be provided prior to August 3, 1981, the beginning of the new school year. No stay of that relief will be made by this Court at this late date. The prompt compliance with the terms

of this and the May order will be required and expected of both parties.

Enter July 24, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO,

Plaintiff,

v.

CARLOS CHARDON, *et al.*,

Defendants.

ORDER

Defendants have filed on July 6, 1981, their Motion to Vacate or Rescind the Back Pay Award to plaintiffs as contained in the May 12, 1981 order of this Court, together with a supporting memorandum. The basis of this motion is defendants' allegation that such an award would violate the Eleventh Amendment to the United States Constitution as interpreted by *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and its progeny. Prior to and at the trial of this cause, defendants repeatedly raised and were heard upon numerous defenses put forward in motions to dismiss and motions for summary judgment. The issue raised today is one that has already been resolved against defendants by the judges who considered these matters in this case. Judge Torruella dealt definitively with these issues in a decision and order issued September 19, 1980. That order reads in pertinent part:

> Defendants fourth argument is that the claim is barred by the Eleventh Amendment. They argue that the individual Defendants are being sued in their official capacities and that the suit against them is actually one against the Commonwealth of Puerto Rico.
>
> This contention by Defendants is without merit. The Eleventh Amendment does not preclude a suit in federal court to seek relief from the deprivation of constitutional rights by state officials. *Scheuer* v. *Rhodes*, supra; *Ex*

Parte Young, 209 U.S. 123 (1908); *Down* v. *Dept. of Public Welfare*, supra. *Ex Parte Young*, the landmark case on this issue, provides that where the action taken is unconstitutional, as alleged herein by Plaintiff, the individual official,

> . . . "is stripped of his official or representative character and is subjected in his person [sic] to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." Id., at 159-160.

1. Timeliness

This motion was filed in July, 1981. Trial of the case had been held in late January, early February, 1981 and resulted in a verdict for the plaintiffs. Both parties were permitted the utmost latitude in putting their viewpoint before this Court on defendants' motion for a new trial and for judgment notwithstanding the verdict. An extensive decision and order of the Court denied defendants' judgment notwithstanding the verdict, but limited the plaintiffs to the prospective relief of reinstatement and an award of back pay to make them whole. The parties were directed to meet and provide the Court with the applicable back pay figures. Defendants requested and were granted more time to ascertain the correct amounts. Fully two months after the Court filed its order, defendants now again raise a legal issue seeking to set aside the results. This motion is untimely. This motion should have been made within ten days of the Court's decision. F.R.C.P. 50 and 52. The Court has already considered on the merits one timely motion of defendants seeking to set aside the judgment of this Court. *See* defendants' Motion to Include Additional Findings dated May 22, 1981 and the Court's denial of that motion. Therefore, defendants cannot claim ignorance of the applicable time restrictions.

Nor can this motion's untimeliness be cured by indicating some relevant, late breaking constitutional pronouncement of the Supreme Court. The cases defendants depend upon, *Edel-*

man v. *Jordan*, 415 U.S. 651 (1974), *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), and *Quern* v. *Jordan*, 440 U.S. 332, 341 (1979), were all decided prior to pretrial motion practice in this case. While nothing indicates a duty upon this Court to address this motion on the merits, the Court will do so in the alternative, secondary to its ruling that the motion is untimely.

II. The Merits

The defendants contend at length that federal courts in 42 U.S.C. § 1983 actions "may not include a retroactive award which requires the payment of funds from the state treasury," citing *Edelman* v. *Jordan*, *supra*, at 677. There is no merit in this claim. Defendants admit that the Commonwealth of Puerto Rico is not a party defendant, but go on to claim that the Commonwealth is the "real substantial party in interest." Presumably the Commonwealth stands in this position due to 32 L.P.R.A. § 3085, by which the Commonwealth voluntarily chose to "assume the payment of any judgment that may be entered against his [public officials] person." This voluntary assumption of liability must negate defendants' arguments.

Nor does the defendants characterization of the Eleventh Amendment question make the award of back pay "retroactive" merely by calling it so. The relief requested in this case, reinstatement and back pay, can only be characterized as prospective in nature, satisfying the standard of *Quern* v. *Jordan*, 440 U.S. 322, 336-37 (1979). The back pay relief is merely "ancillary" to the prospective relief of reinstatement. *Id.* at 349, citing *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977). It is not a purely retroactive award requiring unauthorized payments of funds from the Commonwealth Treasury, a cause that would run afoul of *Edelman* v. *Jordan*, *supra*, at 676-77.

Defendants contend that the Supreme Court's admittedly willing authorization of back pay awards against state and local governments in Title VII cases, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), does not indicate that such a back pay award is possible under § 1983. *Albemarle* indicates how

important the Court considers back pay in offsetting the act of discrimination. The Court stated at 422 U.S. at 418-19:

> [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). And where a legal injury is of an economic character,
>
> > "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Wicker* v. *Hoppock*, 6 Wall. 94, 99 (1867).

Dismissal based on political affiliations is not less offensive. *See Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445 U.S. 507 (1980). Defendants contend that § 1983 does not constitute sufficient authority to allow for a back pay remedy despite the jury's finding of a constitutional violation in this case. In *Gurmankin* v. *Costanzo*, 626 F.2d 1115 (3d Cir. 1980), *cert. denied*, 101 S.Ct. 1375 (1981), the Third Circuit specifically held that a teacher not hired for a constitutionally impermissible reason was fully entitled to back pay against the state agency involved. The Third Circuit concluded that the scope of relief under 42 U.S.C. § 1983 included back pay computed from the date when the teacher was wrongfully not hired. The Court reasoned that "equitable remedies comparable to those deemed appropriate in Title VII employment discrimination cases" was necessary, and to refuse it would be incongruous. *Id.* at 1121.

In *Gurmankin*, the court ruled it an abuse of discretion for the district court not to order back pay. This occurred in a case where public officials had not acted in bad faith, as opposed to

the facts in this case, yet the agency involved was required to make back payments as a result of the unconstitutional conduct.

The Third Circuit's reasoning was previously approved by the Fifth Circuit which has specifically held that back pay is an equitable remedy available in cases dealing with school districts. *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). The following portion of that case was cited with approval by the *Gurmankin* court at 1122:

> Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstatement. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished by their earnings, if any, in the interim. Back pay is merely an element of the equitable remedy of reinstatement. *See Smith* v. *Hampton Training School for Nurses, supra. See also NLRB* v. *Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 48, 57 S.Ct. 615, 629, 81 L.Ed. 893; *Agwilines, Inc.* v. *NLRB*, 5 Cir., 1936, 87 F.2d 146, 151.

For these reasons, the defendants' July 6, 1981 Motion to Rescind the Back Pay Award is denied.

Enter July 24, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 79-198

JUAN FUMERO SOTO,

Plaintiff,

v.

CARLOS CHARDON, *et al.*,

Defendants.

ORDER

Defendants' motion for judgment notwithstanding the jury's verdict has required a detailed examination of the jurisprudence regarding qualified immunity of state officials from damages. For the reasons stated in the following Memorandum, the defendants' motion for judgment notwithstanding the verdict is denied.

The Court exercises its equitable power to order that the Commonwealth of Puerto Rico Department of Education reinstate all those plaintiffs who have remained in their employ to the respective positions each held, or its functional equivalent, at the time of their demotion.[1] This reinstatement may be accomplished in accordance with the dictates of sound administrative practices. Therefore, reinstatement may be delayed until the end of the present school year, but not later than the start of the next school year.

The Department is further ordered to pay plaintiffs' full back pay in the amount to be computed in each case,[2] and to take all other affirmative relief necessary to make the plaintiffs whole. Any delay in reinstatement pursuant to the administrative practices described above will not vitiate the requirement that back pay be awarded up to and including the time reinstatement takes place. Those teachers who chose to leave the De-

partment will be allowed back pay calculated for the period they were in reduced positions until they voluntarily terminated their teaching positions.

However, as a matter of law and in light of the jury's factual finding that the defendants did not have a malicious intent to deprive plaintiffs of their rights, the relief herein granted exhausts the remedies and damages available to plaintiffs. Despite the bifurcation of this trial into liability and damage elements, the jury's findings vitiates the need to hold damage trials.

With respect to any claim for which no statute of limitation defense was pending, final judgment will enter pursuant to Fed.R.Civ. P. 54(b), once the filing requirements of Notes 1 and 2 shall have been complied with and approved by the Court.

The Court will consider a petition for plaintiff's attorney's fees, along with the appropriate briefing and documentation of time involved when final judgment has been entered according to the terms of this Order.

Notes

(1) In approximately 10-15 of these cases, defendants have asserted a defense that the claims were barred by the applicable statute of limitations. This defense was specifically reserved when these cases were consolidated. This issue is presently before the Court of Appeals for the First Circuit in related "Chardon" teacher discrimination cases. This Court will await that decision before dismissing the complaints or entering judgment on behalf of the individual plantiffs therein, pursuant to this Court's Memorandum Order of January 28, 1981.

The parties are directed to meet at the earliest possible time for the purpose of providing this Court with a list of those cases where judgment can be immediately entered in accordance with this Order, and those which would be controlled by the ruling of the Court of Appeals. This list shall be filed with the Court within 30 days of the filing of this Order. If the parties

are not in agreement on a particular case, they will immediately note the basis of their disagreement, specifying the date the demotion letter was sent, the date received, and the date the particular complaint was filed. The Court will consider any supplemental information the parties deem appropriate.

(2) The calculation of the back pay amount should not require the intervention of the Court. The parties are directed to meet and calculate the amount owed each plaintiff. A list setting forth the amount due each plaintiff must be filed within 30 days of the filing of this Order. Judgment will then be entered accordingly.

SO ORDERED.

ENTER: May 7, 1981

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge

Juan Fumero SOTO, Plaintiff,

v.

Carlos CHARDON et al., Defendants.

Civ. No. 79-198.

United States District Court,
D. Puerto Rico.

May 7, 1981.

Hiram Cancio, Jaime R. Nadal Arcelay, Jesus R. Rabell Mendez, Blanca Mera Roure, and Cancio, Nadal & Rivera, Hato Rey, P.R., for plaintiff.

Robert Cordova, Sally de Jesus Kellogg, San Juan, P.R., Ines Equia Miranda de Casanova, Puerto Rico Dept. of Justice, San Juan, P.R., for defendants.

MEMORANDUM

GRANT, Senior District Judge, sitting by designation.

Fifty-five school teachers and administrators, plaintiffs in these 55 consolidated cases, brought individual suits charging that they were unlawfully discriminated against and demoted due to their association with and membership in the Popular Democratic Party (PDP), a political party in the Commonwealth. Each plaintiff's theory is that Carlos A. Chardon, then Secretary of Education for the Commonwealth, and his Assistant Secretary for Personnel, Oscar Ramos, members of the governing New Progressive Party, unlawfully demoted each of the plaintiffs at dates ranging from May till June of 1977, in violation of the First and Fourteenth amendments, 42 U.S.C. § 1983, and various Puerto Rican statutes. 18 L.P.R.A. §§ 249e,[1] 211 and 214 *et seq.* Actions under Puerto Rican law

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[1] 18 L.P.R.A. § 249e prohibits school officials from making personnel changes based on an employee's political affiliation.

come within both § 1983 and its jurisdictional predicate, 28 U.S.C. § 1343(3). *Examining Board of Engineers* v. *Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976). It is impermissible to discriminate in the work place based upon a person's political affiliations. *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti* v. *Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).[2] These suits were brought against Chardon and Ramos in their individual and official capacities.[3]

Before trial, the individual plaintiffs, each represented by the same group of attorneys, indicated that a large portion of their proof at trial would consist of establishing a pattern of unlawful discrimination, requiring repetitious testimony from a number of plaintiffs. Inasmuch as the factual and legal issues, the attorneys and the parties were common to all these cases, these suits were ordered consolidated pursuant to Fed.R. Civ.P. 42(a). Subsequently, other judges in this district transferred a number of "Chardon" cases for inclusion in the consolidated trial. This trial was bifurcated, and was to consider only the liability issues. Fed.R.Civ.P. 42(b). *See* Court Order, January 1981. In essence, the jury's findings on the issue of liability in this captioned case was made binding upon the parties in all of the consolidated cases. The damages issues were not consolidated.

Each of the plaintiffs herein was demoted from the position of school principal or other supervisory position in which he or

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[2] The affirmative defense that the plaintiffs were confidential or policymaking employees, and hence, not protected from discharge, was not raised as an issue in this case.

[3] Since Chardon resigned as Secretary before trial, the new Secretary of Education is automatically substituted in her official capacity for Chardon, Fed.R.Civ.P. 25(d). The caption has not been formally changed to reflect this. Chardon, of course, remains a defendant in his individual capacity.

she did not have tenure. Upon demotion as ordered by the Department he or she was returned to the tenured position as school teacher or to lesser administrative rankings, as previously occupied. No one was discharged. While the complaints of most teachers requested declaratory relief, reinstatement, back pay and punitive damages, approximately ten to fifteen suits were filed by teachers who chose to leave the Department during the pendency of these lawsuits. These ex-teachers were no longer interested in the equitable relief of reinstatement, but in turn sought a more substantial monetary judgment than those who remained employees of the Department.

These cases were tried to a jury. With the agreement of counsel, the following instruction was given pertaining to the defendants' affirmative defense that they had acted in good faith while demoting each plaintiff, and thus were protected by a qualified official immunity:

> We have made reference to the affirmative defense of good faith and a qualified immunity.
>
> The jury is instructed that the defendants were each public officials of the Commonwealth of Puerto Rico. They were acting in their official capacity at all times pertinent to this case.
>
> And, as such, they did enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary.
>
> It is the existence of reasonable grounds for the belief formed and acted upon at the time, and in light of all the circumstances, coupled with a good faith belief, that affords a basis for a qualified immunity of State officials for acts that are performed in the course of their official conduct.[4]
>
> The Commonwealth officials who are defendants in this case are not immune from liability for actions taken under

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[4] This paragraph is taken from *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974).

> Section 1983 if that official knew or should have known that the action taken within his sphere of official responsibility would violate the Constitutional or legal rights of the teachers affected, *or if the official took the action with the malicious intention of causing a deprivation of Constitutional or legal rights or other injury to the teachers.*[5] (emphasis added).

The jury returned a verdict for the plaintiff and against each defendant. The Court then defined malicious intent,[6] and requested that the jurors return to their deliberations to answer the following interrogatory:

> Following a finding by the jury that the defendants Carlos Chardon and Oscar Ramos, individually and in their official capacities are liable to the plaintiffs in this consolidated cause, the jury is now instructed to deliberate further for the sole purpose of answering this question: Did the defendant Carlos Chardon *have a malicious intent to deprive plaintiffs of their constitutional or other rights?*
>
> And a similar question with respect to the other defendant: Did the defendant Oscar Ramos *have a malicious intent to deprive the plaintiffs of their constitutional or other rights?* (emphasis added).

The jurors answered "No" with respect to each defendant. No objection was made regarding this interrogatory. It is noted here that the language in the prior charge and the special interrogatory is identical. The Court now must give effect, if

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[5] This paragraph is taken from *Wood* v. *Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000-1001, 43 L.Ed.2d 214 (1975).

[6] I am going to read to you a definition from a couple of cases as to what that constitutes.

"Malice is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will imply an evil intent."

And the other, from the other case, I read as follows: "Maliciousness does not necessarily mean actual malice or ill-will, but intentional doing of a wrongful act without legal or social justification."

possible, to both the general verdict for plaintiff, and the interrogatory answer that defendants lacked malicious intent.

(I) *Punitive Damages*

The Supreme Court has construed 42 U.S.C. § 1983 to allow an award for compensatory damages. It has not, as yet, definitively ruled as to whether punitive damages are also available:

> To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, *there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.* See *Imbler* v. *Pachtman*, 424 U.S. 409 at 442, 96 S.Ct. 984 at 1000, 47 L.Ed.2d 128 (White, J., concurring in judgment).

Cary v. *Piphus*, 435 U.S. 247, 256-57, 98 S.Ct. 1042, 1048-1049, 55 L.Ed.2d 252 (1978) (emphasis added) (footnote omitted). The footnote following this holding further explained the Court's position:

> *This is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights.* See, *e.g.*, *Silver* v. *Cormier*, 529 F.2d 161, 163-164 (CA10 1976); *Stengel* v. *Belcher*, 522 F.2d 438, 444 n.4 (CA6 1975), cert. dismissed, 429 U.S. 118 [97 S.Ct. 514, 50 L.Ed.2d 269] (1976); *Spence* v. *Staras*, 507 F.2d 554, 558 (CA7 1974); *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (CA1), cert. denied, 393 U.S. 940 [89 S.Ct. 299, 21 L.Ed.2d 276] (1968); *Mansell* v. *Saunders*, 372 F.2d 573, 576 (CA5 1967); *Basista* v. *Weir*, 340 F.2d 74, 84-88 (CA3 1965). Although we imply no approval or disapproval of any of these cases, we note that there is no basis for such an award in this case. *The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury, see n.6, supra, and the Court of Appeals approved only the award of "nonpunitive" damages, 545 F.2d 30, 31 (1976).*
>
> We also note that the potential liability of § 1983 defendants for attorney's fees, see Civil Rights Attorney's Fees

> Awards Act of 1976, Pub.L. 94-559, 90 Stat. 2641, amending 42 U.S.C. § 1988, provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights. See also 18 U.S.C. § 242, the criminal counterpart of § 1983.

Id. at 257 n.11, 98 S.Ct. at 1049 n.11 (emphasis added).

The Court of Appeals for the First Circuit has held that punitive damages are available against § 1983 defendants "when there are aggravating circumstances." *Fact Concerts, Inc.* v. *City of Newport*, 626 F.2d 1060, 1067 (1st Cir. 1980), citing *Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 121 (1st Cir. 1977) (bad faith) and *Caperci* v. *Huntoon*, 397 F.2d 799, 801 (1st Cir.), *cert. denied*, 393 U.S. 940, 89 S.Ct. 299, 21 L.Ed.2d 276 (1968) (unwarranted invasion of privacy). In *Rosado*, *supra*, it was stated: "[I]ntentional interference with constitutional rights, standing alone, is not enough; there must also be 'aggravating circumstances.' " 562 F.2d at 121. Citing the standards used by other circuits, the *Rosado* court continued: "and the Third Circuit has described the standard as 'malicious and wanton disregard' of a plaintiff's rights." *Id.* (citation omitted).

The jury's answer to the interrogatories in this case ended any claim for punitive damages. As the plaintiff's attorneys acknowledged, the award of punitive damages is a decision for the trier of fact. Although the parties failed to raise the issue, any decision granting or denying punitive damages must include an assessment of the conduct in question, evidentiary inferences and evaluations pertaining to motive and knowledge. *Alicea Rosado* v. *Garcia Santiago*, *supra*. *See also Lee* v. *Southern Home Sites Corp.*, 429 F.2d 290, 294 (5th Cir. 1970). *See also* Annot., 14 A.L.R.Fed. 608 (1970). It became apparent that failure to have questioned this liability jury regarding the defendants' intent would have required a full repetition of the liability trial testimony in any subsequent trial on the issue of punitive damages. However, based upon the jury's findings, no punitive damages can now be awarded. With this in mind, the Court will now address defendants'

contention that the jury's interrogatory answers unwittingly opened the door to an inconsistent verdict.

(II) *The Motion For Judgment Notwithstanding The Verdict*

Defendants moved for a directed verdict at the close of the evidence offered by plaintiff, and again at the close of defendants' evidence on the official immunity defense. The Court reserved its decision upon that motion. After the jury's answer that defendants lacked a malicious intent, defendants moved for judgment notwithstanding the verdict. Defendants contend that these answers entitle them to prevail in their affirmative defense of qualified immunity, and that the general liability verdict is contradicted by the interrogatory answers to the effect that defendants had no malicious intent. In the alternative, they claim as a matter of law that the answers bar any subsequent claim for damages from the individual defendants.

The Court is not persuaded in the first instance that the findings are contradictory. To that extent, judgment notwithstanding the verdict is denied. The Court is persuaded, however, that the jury's answers do preclude the award of damages against the defendants in their individual capacity based upon an independent question of law.

The standard for ruling on a motion for judgment notwithstanding the verdict is the same as the standard for a directed verdict motion. The district court is to review the evidence in the light most favorable to the prevailing party, giving the plaintiff here the benefit of all the factual inferences that the evidence fairly supports without weighing the credibility of the witnesses. Fed.R.Civ.P. 50(b). *Fact Concerts, Inc.* v. *City of Newport, supra*, 626 F.2d at 1064. *See also Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962); *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80, 64 S.Ct. 232, 234-235, 88 L.Ed. 239 (1943). Reviewing the testimony presented in this case by that standard, the Court cannot conclude that the evidence presented was insufficient to permit a rational jury from reaching

both the verdict of liability and finding on the lack of malicious intent. Therefore, under the applicable standard the Court must effectuate both the general verdict and interrogatory answers. At this point, however, the Court must state its view of the evidence that was presented. The evidence of political discrimination and the defendants' personal involvement in the demotions was not overwhelming. Candidly, a reasonable man could have found the plaintiff's proof unconvincing. The Court will not invade the jury's province to substitute its credibility determinations and reach an alternative judgment. But in this case the jury had two bites of the apple so to speak, and both must be harmonized by the Court, if possible, under a fair reading of the answers. Fed.R.Civ.P. 49(b). *See Gallick* v. *Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618 (1963).

Fed.R.Civ.P. 49 and the cases which construe it indicate that, "[W]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798 (1962). Although that case discussed Rule 49(a), while this case arises under Rule 49(b), the principles expressed remain equally valid. In fact, if the difference between the general verdict and interrogatory answers is perceived as possibly inconsistent, the general admonition is that the answers to special interrogatories should control, rather than the general verdict.[7] The power to enter judgment on findings inconsistent with the general verdict "is a constitutional one

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[7] *Blackwell* v. *Cities Service Oil Co.*, 532 F.2d 1006 (5th Cir. 1976); *Nimnicht* v. *Dick Evans, Inc.*, 477 F.2d 133 (5th Cir. 1973); *Elliott* v. *Watkins Trucking Co.*, 406 F.2d 90, 92 (7th Cir. 1969); *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 406 07 (9th Cir.), *cert. dismissed*, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964); *United States* v. *City of Jacksonville, Arkansas*, 257 F.2d 330 (8th Cir. 1958); *Golden North Airways, Inc.* v. *Tanana Publishing Co.*, 218 F.2d 612 (9th Cir. 1954).

and does not violate the Seventh Amendment since the jury's findings of fact are not being reexamined but, as a reasonable regulation of practice, their more specific findings of fact are allowed to control their general conclusion embodied in the general verdict." 5A Moore's Federal Practice ¶ 49.04; Wright and Miller, Federal Practice and Procedure: Civil § 2513. In summary, while harmonizing the answers the more general liability verdict must give way to the more specific lack of intent finding. This principle will be borne in mind when the qualified immunity issues are considered.

(III) *Qualified Immunity From Damages*

A. *Liability*

The nature of the qualified immunity defense at common law and in § 1983 cases has been judicially established commencing with *Scheuer* v. *Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).[8] In *Scheuer*, the Governor of Ohio, the University President and National Guard officers involved in the Kent State University killings claimed absolute official immunity from damages under § 1983. This discussion is of particular significance in the case before us inasmuch as *Scheuer* addresses the scope of immunity available to state executive officials occupying positions of authority analogous to those held by the defendants here. The Court began by noting the reasons why officials had been held immune from suits for personal damages at common law:

> The concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity. While the latter doctrine—that the "King can do no wrong"—did not protect all government officers from *per-*

[8] The Court has made clear that immunities under § 1983 are to be read in harmony with the general principles of tort immunities and defenses. *Imbler* v. *Pachtman*, 424 U.S. 409, 418, 96 S.Ct. 984, 989, 47 L.Ed.2d 128 (1976). *See also Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

sonal liability, *the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability.* This official immunity apparently rested, in its genesis, on two mutually dependent rationales: *(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.*

416 U.S. at 239-40, 94 S.Ct. at 1687-1688 (emphasis added) (footnotes omitted).

In holding that a qualified official immunity exists, Justice Harlan's prior admonitions on this subject were restated, followed by the Court's holding.

"To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas*, *supra*, [161 U.S. 483] at 498 [16 S.Ct. 631 at 637, 40 L.Ed. 780]—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. 360 U.S., at 573-574, [79 S.Ct. at 1340-1341]."

These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that

> affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 247-48, 94 S.Ct. at 1692 (emphasis added).

In this case, plaintiff concedes that a qualified official immunity clothed both Chardon and Ramos inasmuch as the Commonwealth's Secretary of Education is given practically limitless discretionary powers in the personnel area. 18 L.P.R.A. § 211 *et seq.* While this discretionary power cannot be used to ratify political discrimination in promotion and demotion policies, the *Scheuer* Court apparently contemplated a de facto "sliding scale" of qualified immunity protection for public officials. In *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Court again confirmed that like the state cabinet officials and state governor in *Scheuer*, the federal cabinet appointee in *Butz* deserved the highest level of protection from suits against him, *i.e.*, below the level of absolute immunity. Implicitly, this requires a heightened degree of knowledge, personal participation and malice by the higher executive official in an allegedly discriminatory action. *See also Williams* v. *Anderson*, 562 F.2d 1081, 1101 (8th Cir. 1977).

Scheuer was followed by *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), which examined the scope of immunity for members of a school board in disciplinary proceedings. Essentially, the Court again sought to steer between the two weighty and competing concerns in this area—making public officials responsible for violating citizen's constitutional rights, without emasculating the officials' power, and will, to make difficult or unpleasant decisions when necessary. *See also Butz* v. *Economou*, *supra*, 438 U.S. at 503, 98 S.Ct. at 2909.

Comparing the *Scheuer* defendants with the *Wood* officials, the latter occupied much lower executive positions. The *Scheuer* analysis would indicate that a lesser degree of qualified immunity would be sufficient to protect the *Wood* defendants. The "variation" in the scope of the immunity accorded the

officials in *Scheuer* was at a low ebb in *Wood* v. *Strickland* for this reason. In *Wood* the Court held:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 *if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional or other injury to the student.*

Id., 420 U.S. at 322, 95 S.Ct. at 1001 (emphasis added).

In the present case, the jury was instructed, without objection, in accord with this dual *Wood* standard. Parsing this standard, the "should have known" language can be characterized as a negligence standard. It is an objective measure of the defendants' conduct, although the "knew" portion is subjective in the sense that it requires an examination of the defendants' state of mind. Via the conjunctive "or" the Court connected the second branch to the *Wood* standard, a subjective intent test which inquires whether the official maliciously intended to injure the plaintiff. Based upon the jury's answer to the special interrogatory, there was no such impermissible intent in this case. Therefore, the "knew or should have known" standard is the branch plaintiffs must depend upon here.

The compelling policy dilemma of the immunity decisions is the need to balance the plaintiff's compensation for injuries with the need to protect the decision making process. *Barr* v. *Mateo*, 360 U.S. 564, 565, 79 S.Ct. 1335, 1336, 3 L.Ed.2d 1434 (1959). To complicate any analysis under the *Wood* holding, however, the Court has left further instructions which must be integrated with the liability analysis.

B. *Damages*

As noted in *Wood:*

> *Liability for damages for every action which is found subsequently to have been violative of a student's con-*

> *stitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties.* School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray, supra*, 386 U.S., [547] at 554, 87 S.Ct., [1213] at 1218 [18 L.Ed.2d 288]. *The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.* The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

420 U.S. at 319-20, 95 S.Ct. at 999-1000 (emphasis added) (footnote omitted).

In addition to the *Scheuer* and *Butz* "sliding scale" of immunity, and the *Wood* liability standard, the Court has indicated here that merely satisfying the *Wood liability test* may not be sufficient to allow an award of *damages*. Once liability exists, damage awards still depend to some degree on the subjective determination of whether the official acted in good faith, *e.g.*, whether the "mistaken" constitutional deprivation is reasonable or unreasonable. Rather than only one standard by which to provide a readily discernible litmus test to judge official immunity, it is apparent from the Court's opinion that the analysis regarding damages is more complicated. An official could make a "reasonable" mistake protected by official immunity, a mistake which might otherwise constitute an actionable violation of 42 U.S.C. § 1983.

The Court concluded the *Wood* analysis by making the following admonition regarding damages:

> *A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.*

Id. at 322, 95 S.Ct. at 1001 (emphasis added).

Before evaluating the verdict and interrogatory answers in light of the *Wood* damage holdings, it appears that integrating these damage teachings with the liability standards yields a presumably unintended conflict. Under § 1983 and the *Wood* liability standard of "knew or should have known," liability can exist for non-deliberate conduct. However, in the absence of an impermissible motivation, or deliberate disregard for citizen's rights, damages should not be awarded. The conflict does not stem from faulty analysis, but is a product of the requirement that a balance be struck which protects both citizens and officials. In effect, qualified immunity protects officials like Chardon and Ramos from damages even when they objectively should have known that violations of constitutional rights were occurring, but where they took these actions in the absence of malicious or bad motivation. While a specific answer to the question of whether the mistake was "reasonable" or "unreasonable" would clearly answer this concern, no jury finding exists on that question.

Although the Supreme Court has specifically limited the *Wood* v. *Strickland* decision to the context of school discipline, *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), these damage teachings have been expanded upon and utilized in other areas. Rather than slavishly utilizing the *Wood* v. *Strickland* decision, these cases indicate that the standard for awarding damages against officials is higher than mere negligence on the part of the official involved.[9]

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[9] The Supreme Court has left open the question of whether negligence on the part of state officials is sufficient to constitute a constitutional violation. *See Baker* v. *McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). The cases collected in *Bonner* v. *Cough-*

The appropriate test, drawn from the Supreme Court's opinions, was stated by the Seventh Circuit in *Thomas* v. *Pate*, 516 F.2d 889, 891, n.2 (7th Cir.), *cert. denied*, 423 U.S. 877, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975), and again restated as the holding of *Bonner* v. *Coughlin*, 545 F.2d 565, 568 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 529 (1978) (footnote omitted):

> [A] plaintiff must prove that the defendant has acted within the sphere of his official responsibility, "with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff] or "with such disregard to the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

Neither test is satisfied here. First, the jury finding that there was no malicious intent precludes the Court from finding the officials acted out of an impermissible motivation. Nor does the evidence presented at trial support such a proposition.

Second, plaintiff claims that defendants objectively acted with a deliberate disregard of his established constitutional rights, *e.g.*, the employee's right not to be discharged for his political affiliations. As an example, plaintiff cites *McCormick* v. *Edwards*, 479 F.Supp. 295 (M.D.La.1979), where the district court ruled that public officials could not rely on their subjective claim that they had acted in good faith, while pleading ignorance of clearly established due process rights. The defendants in that case knew of the due process rights but claimed not to know these rights applied to the plaintiff. *Id.* at 299.

This type of analysis is not helpful in the case at bar where Chardon and Ramos have never claimed ignorance of the law,

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lin, 545 F.2d 565, 568 n.8 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932, 98 S.Ct. 1507, 55 L.Ed.2d 529 (1978), indicate the majority view is that mere negligence is not enough. The First Circuit holding is to that effect. *Page* v. *Sharpe*, 487 F.2d 567 (1st Cir. 1973). *See also Bogard* v. *Cook*, 586 F.2d 399 (5th Cir. 1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979).

or of the teacher's right not to be discharged for his political affiliations. Defendants do not claim good faith in light of an unexpected, late-breaking constitutional doctrine as discussed in *Woods*. Their theory throughout this litigation has been that the demotions were for non-political reasons, and that their personal role in these decisions, particularly Secretary Chardon's, was extremely limited. Although plaintiff is correct in asserting that the right in question is a clear proposition of constitutional law it is proof of motive that is the key to unlocking this case.

The burden of proving what can conveniently be analogized as the two-sided qualified immunity coin, with proof of the officials' good faith on one side, or proof of their bad faith on the other, has been seen as mutually exclusive propositions. The First Circuit succinctly stated this in *Gomez* v. *Toledo*, 602 F.2d 1018, 1020 (1st Cir. 1979), *rev'd*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980):

> It has now been firmly established by a long line of cases that in a civil rights action for damages, public officials acting in their official capacity enjoy a qualified immunity that protects them if they acted with a good faith belief based upon reasonable grounds that their actions were necessary. *Or to put it conversely*, a plaintiff in such an action must prove that the public official acted in bad faith, meaning with malice or recklessness. *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *O'Connor* v. *Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975); *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 [94 S.Ct. 1683, 40 L.Ed.2d 90] (1974); *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).[10]

(emphasis added).

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[10] The Supreme Court has not passed upon the burden of proving, as opposed to pleading, the official immunity defense. The First Circuit originally had charged the plaintiff with the burden of pleading and proving bad faith on the part of the officials involved. *Gomez* v. *Toledo*, 602 F.2d 1021 (1st Cir. 1979). This decision was reversed

In this case, defendants contend that the finding that they did not act with a malicious intent is tantamount to a finding that they acted in good faith. If such were the case, defendants would have succeeded in proving that they are clothed with a qualified immunity in this case. Likewise, plaintiff contends that the general liability finding constitutes a finding of bad faith in the objective sense, although they concede that the jury found the defendants did not have the subjective intent to deprive plaintiffs of their rights. Candidly, these admittedly less than definitive findings do not yield what either party would like them to. A finding that the defendants objectively "knew or should have known" discrimination was occurring may be sufficient for a general finding of liability but it does not satisfy the requirements for damages. Defendants proffered and the jury accepted proof that they did not act with a malicious intent. This does not, however, indicate that they acted in good faith.

The peculiar context of the present case simply does not permit the expected converse finding, discussed by the First Circuit, to occur. Instead, readily discernible elements of each alternative appear and can be rationalized to yield a coherent result. This result, however, convinces us that further legal damages cannot be awarded.

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by the Supreme Court which held that § 1983 plaintiffs did not have to anticipate what is an affirmative defense, *i.e.*, the good faith actions of the officials involved, by pleading that they acted in bad faith. *Gomez* v. *Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Justice Rehnquist concurred in the Court's otherwise unanimous opinion, but noted his belief that the burden of persuasion, apart from the burden of pleading, remained undecided.

The Court cited several cases to indicate that the burden of persuasion lies with the officials. *McCray* v. *Burrell*, 516 F.2d 357, 370 (4th Cir. 1975) (en banc), *cert. dismissed*, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976); *Gilker* v. *Baker*, 576 F.2d 245 (9th Cir. 1978); cited in *Gomez* v. *Toledo*, 446 U.S. at 638 n.5, 100 S.Ct. at 1922 n.5. No contrary rulings were cited.

Further research disclosed a number of cases which leave the burden of proving good faith to the defendant officials. When *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) was remanded, the Second Circuit placed the burden on the police officers to show they had reasonable beliefs regarding the legality of their actions. 456 F.2d 1339, 1347-48 (2d Cir. 1972). *See also Thompson* v. *Burke*, 556 F.2d 231 (3d Cir. 1977); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 61-62 (3d Cir.), *cert. denied*, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976); *Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir.) *(en banc)*, *cert. denied*, 429 U.S. 865, 97 S.Ct. 174, 50 L.Ed.2d 145 (1976); *Glasson* v. *City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732 (3d Cir. 1973); *Benford* v. *American Broadcasting Companies, Inc.*, 502 F.Supp. 1148 (D.Md.1980); *Fujiwara* v. *Clark*, 477 F.Supp. 822, 832 (D.Haw.1979); *Eckerd* v. *Indian River School District*, 475 F.Supp. 1350, 1368 (D.Del.1979); *Cameron* v. *Montgomery County Child Welfare Service*, 471 F.Supp. 761, 764 (E.D.Pa.1979); *Forsyth* v. *Kleindienst*, 447 F.Supp. 192, 202 (E.D.Pa.1978), *modified on other grounds*, 599 F.2d 1203 (3d Cir. 1979); *Eubanks* v. *Clarke*, 434 F.Supp. 1022, 1033-34 (E.D.Pa.1977); *Mack* v. *Johnson*, 430 F.Supp. 1139, 1147 (E.D.Pa.1977), *aff'd*, 582 F.2d 1275 (3d Cir. 1978); *Burkhart* v. *Saxbe*, 397 F.Supp. 499, 502 (E.D.Pa.1975).

In this case, the burden of proof on the qualified official immunity defense was allocated to the defendants. This instruction was accepted without protest by both parties. Therefore, they are bound by it. Fed.R.Civ.P. 51. *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808, 69 S.Ct. 1326, 1330, 93 L.Ed. 1704 (1949) (civil case); *Johnson* v. *United States*, 318 U.S. 189, 200, 63 S.Ct. 549, 554, 87 L.Ed. 704 (1943); *United States* v. *Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936); 5A Moore's Federal Practice 51.04 at 51-28, 51-30 to 51-35; *Redmond* v. *Baxley*, 475 F Supp. 1111, 1115 (E.D.Mich.1979).

If the proof of the parties is less than definitive upon the defense of qualified official immunity, then the policy concerns of *Scheuer* and *Wood*, the need to protect the decision making powers of public officials, particularly state cabinet members, comes to the fore. The case at bar presents at best ambiguous findings regarding the motivation these officers brought to this situation. In such an ambiguous case, where the Court can exercise its equitable powers to make plaintiffs whole, further damages are not warranted.

This comports with the Supreme Court's instructions regarding § 1983 damages. Although by its own terms § 1983 creates a species of tort liability that admits of no immunities, *Owen* v. *City of Independence, Missouri*, 445 U.S. 622, 650-51, 100 S.Ct. 1398, 1415-1416, 63 L.Ed.2d 673 (1980), qualified immunity for public officials has been a product not of legislation, but of "judicial thinking" upon the conflicting policies involved. *Butz* v. *Economou*, *supra*, 438 U.S. at 501-02, 98 S.Ct. at 2908. Applying this judicially created immunity in accord with the dictates of prior decisions, if damages are not limited we run the risk of "dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, Judge).

Where the Supreme Court has considered the role of damages as compensation for violations of constitutional rights, it has indicated that restraint is recommended. Absent congressional authorization, a court may also be impelled to think more carefully about whether the type of injury sustained by the plaintiff is normally compensable in damages. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Justice Harlan further noted, "[F]or people in Bivens' shoes it is damages or nothing." *Id.* at 410, 91 S.Ct. at 2012. That is not the case here. As will become clear, the plaintiffs here can be given the bulk of the relief sought via equity, without infringing upon the policy concerns discussed by the Court in the qualified official immunity cases. Because that is the case, the efficacy of protecting the official's

decision making power deserves full concern, in accord with the teachings of the Supreme Court. For these reasons, no further proceedings to establish damages are necessary, nor can any be awarded in this case.

(IV) *Injunctive Relief*

While the scope of the qualified immunity defense prohibits the further award of damages, the question of whether equitable relief may be granted poses an entirely different issue. The dominant policy concern which prohibited damages, *i.e.*, the potential chilling effect upon decision makers, is no longer present. The impact that this has on the efficacy of allowing relief was touched upon, albeit briefly, by the Court in *Wood* v. *Strickland*, 420 U.S. at 314-15 n.6, 95 S.Ct. at 996-997 n.6, which stated in part, "[I]mmunity from damages does not ordinarily bar equitable relief as well."

A more definitive examination of this reasoning can be found in *Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974). In that case, a class action filed by persons arrested, assaulted, and expelled from a speaking engagement of then President Nixon, sought declaratory relief against similar actions in the future. The district court found the law enforcement officers involved had no constitutional basis for their actions, and granted a preliminary injunction on plaintiff's behalf. The Court of Appeals rejected the officials' defense of qualified official immunity. Referring to *Barr* v. *Mateo* and *Scheuer* v. *Rhodes* (the same portions of which have been restated again in this memorandum, *supra*) the Fourth Circuit indicated its reasons for upholding injunctive relief:

> These two quotations demonstrate that the immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part.

> *Scheuer* states that the immunity doctrine stems from the same considerations that generated the doctrine of sovereign immunity. That immunity is embodied in the eleventh amendment, so that it is significant to note that since *Ex Parte Young*, 209 U.S. 123 [28 S.Ct. 441, 52 L.Ed. 714] (1908), the law has been settled that, notwithstanding the eleventh amendment, in an appropriate case a state official may be enjoined by a federal court from future violation of federal law.
>
> Thus, we conclude that the preliminary injunction is not vulnerable to the claim of official immunity.

Id. at 1332.

The reasoning in *Rowley* v. *McMillan* is followed by *Stanford Daily* v. *Zurcher*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). *See also Jacobson* v. *Tahoe Regional Planning Agcy.*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part, rev'd in part*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); *Safeguard Mutual Insurance Co.* v. *Miller*, 472 F.2d 732, 734 (3d Cir. 1972); *Martin* v. *Wray*, 473 F.Supp. 1131, 1138 (E.D.Wis.1979). For these reasons, any ruling on the equitable requests for reinstatement of the plaintiffs, and the concomitant back pay for the period during which they have been demoted, is not made under the stringent concerns previously discussed.

Both parties understood, previous to trial and afterwards, that the decision for or against ordering reinstatement was peculiarly within the discretion of the trial court.[11] Equitable relief has traditionally been the province of the Court. While

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[11] The facts which gave birth to the claim for equitable relief were adjudicated by the jury. The plaintiffs are wholly incorrect when they state that this aspect of the case was tried by the jury. In fact, the plaintiffs had previously taken the position that had the jury found for the defendants, the district court, nevertheless, could order reinstatment and other relief independent of that verdict. To now make such an inconsistent argument does not advance their case.

the Court indicated a preliminary intention of being guided by the jury's finding, the jury's verdict was merely advisory in this respect, not a mandatory finding that binds the Court. It was always accepted by the parties that the right to trial by jury did not extend to the right of reinstatement. *See Ross* v. *Bernhard*, 396 U.S. 531, 533, 90 S.Ct. 733, 735, 24 L.Ed.2d 729 (1970).

What plaintiffs did succeed in doing at trial was to establish a cause of action under Section 1983, despite the fact that the jury's findings preclude damages against the defendants involved. The proof of a § 1983 action, absent a claim of qualified official immunity requires only two elements: (1) That the defendants acted under color of state law, and (2) that a constitutional right has been denied. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

Since there was a violation, "an equity court possesses some discretionary power to award damages in order to do complete justice." *Walter* v. *Marathon Oil*, 7th Cir., 642 F.2d 1098 (1981), citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). In *Albemarle*, a Title VII case, the Court held that back pay should not be withheld without special reason. When a public employee is discharged in violation of his First Amendment or other constitutional rights, he is entitled to reinstatement and back pay. *Eckerd* v. *Indian River School District*, 475 F.Supp. 1350, 1365 (D.Del.1979).

Weighing all of the competing interests in this case, all of the teachers in this consolidated case are ordered to be reinstated and given back pay, pursuant to the terms of the court's order.

This award is made in light of the testimony presented at trial, the verdict of the jury, and the interrogatory answers as interpreted by this Court. In equity, if other remedies are made available to the plaintiffs, this award would of necessity have to be fully reconsidered and evaluated. "[S]ince it is the historic purpose of equity to secure complete justice, the

courts are able to adjust the remedies to as to grant the necessary relief, *Equal Employment Opportunity Commission* v. *General Tel. Co. of Northwest, Inc.*, 599 F.2d 322 (9th Cir. 1979), *aff'd*, [446 U.S. 318] 100 S.Ct. 1698, [64 L.Ed.2d 319] (1980) . . . ," quoted in *Walters* v. *Marathon Oil, supra.* This award is also in accordance with the principles of § 1983 relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*

v.

CARLOS CHARDON, individually and as Secretary of Public Education of the Commonwealth of Puerto Rico

and

OSCAR L. RAMOS, individually and as Assistant Secretary of Public Education in Charge of Personnel of the Commonwealth of Puerto Rico,

Defendants

DECISION AND ORDER

This civil rights action is for a second time before us on Defendants' Motion for Summary Judgment. The facts are essentially outlined in our Decision and Order of November 24, 1979. However, for the sake of clarity and for purposes of analysis of the pending Motion we repeat and add to them below.

Plaintiff is a high school teacher in Orocovis, Puerto Rico. It is a position in which he has tenure. During the 1976-1977 school year he served as Director of Schools in Orocovis. The evidence on record reveals that this appointment was subject to renewal on a year to year basis according to the recommendations of his supervisors and the needs of the Department of Education.[1] On May 27, 1977 Plaintiff, both orally

[1] See Defendants' Motion for Summary Judgment, August 15, 1978, Exh. 3, letter dated August 17, 1976 of Ramon A. Cruz, Secretary of Education, to Plaintiff.

and through a written letter, requested from the Superintendent of Schools for the Orocovis District that he be retransferred to his former position as a social science high school teacher.[2] The present action, however, is premised on the contention that shortly thereafter he changed his mind about returning to his previous position as a teacher and wished to remain in the position of Director. See Plaintiff's Sworn Statement of September 20, 1978.[3] On June 21, 1977[4] he was officially notified that he would not be renewed in his position as Director. The letter so notifying Plaintiff of this fact reads:

"Dear Mr. Ortiz Rivera:

"As you know the appointment to the position you now occupy expires with the termination of the present school year.

"While we appreciate your collaboration we remind you that you are correspondingly reinstated to the position in which you have tenure in the system. To this effect our Personnel Division is proceeding to reinstate you to position number 0129 which is as Secondary School Teacher in the Orocovis District effective at the commencement of the next school year."[5]

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[2] This letter is part of the record before us. See Defendant's Motion for Summary Judgment, August 15, 1978, Exb. 2, letter dated May 27, 1977 from Plaintiff to Mrs. Nelida Melendez de Ortiz. See also Sworn Statement of Plaintiff, Sept. 30, 1978.

[3] There is no documentary evidence to this effect other than Plaintiff's Sworn Statement. The reasons given by Plaintiff for not withdrawing the letter of May 27, 1977 or submitting a new one reflecting his changed feelings is that: (1) he did not believe the letter had any legal effect and (2) he had been informed that the decision not to renew him as a Director had already been made.

[4] This notice is dated June 10, 1977 but stamped as received on June 21, 1977. There is no dispute on this fact.

[5] Our translation. See Decision and Order of November 23, 1978 p. 3. This is Attachment A to the Complaint.

At the commencement of the 1977-1978 school year Plaintiff returned under protest to his previous position as a high school teacher. See Attachment B to the Complaint.

On June 19, 1978 a complaint was filed wherein Plaintiff alleged that Defendant's non-renewal of his contract as a Director was politically motivated in that he was not of the same political affiliation as the Secretary of Education and the higher officials within the Department. Defendants' first Motion for Summary Judgment was premised on the contention that the transfer was legal because Plaintiff had in effect initially requested it and as such their actions were only a response to this voluntary request. While noting that this was a plausible argument on the ultimate merits involved in this litigation we rejected it as falling short of the burden of proof placed on Defendant in this type of request for summary judgment. Where a plaintiff has alleged impermissible reasons for a dismissal or a transfer it is not sufficient on summary judgment that the defendant simply set forth permissible reasons for his actions. In this type of situation the Defendants had the burden not only of showing that a permissible factor could have motivated the transfer-demotion, but that no impermissible factor was involved. See: *Mt. Healthy City School District Board of Education* v. *Doyle*, 427 U.S. 274 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Mack* v. *Cape Elizabeth School Board*, 553 F.2d 720 (C.A.1, 1977). In the case at bar Defendants' supporting material was substantial with respect to the first part of this burden, but totally lacking with respect to the second part. Our review of the record reveals that it remains lacking on this point to this date.

Defendants' present Motion for Summary Judgment raises for the first time the claim that this cause of action is time barred. This Motion raises identical problems to those present

in *Allende Vazquez* v. *Chardon, et al.*, Civil Number 79-71.[6] Our analysis and decision therein will control much of the controversy present here. However, the different factual circumstances of these two cases requires that we dispose of these two cases separately, and consequently, differently. There is no dispute here as to either the limitations period that controls or the rule which determines when this limitations period accrues. See: *Allende Vazquez* v. *Chardon et. al.*, at pgs. 3, fn. 6;4. In spite of this both parties argue opposite ends as to exactly what date should be fixed as the date of accrual of Plaintiff's cause of action. These opposing views are set out as follows.

Defendants contend that the limitations period commenced to run on May 27, 1977. Defendants' take this date from Plaintiff's own Sworn Statement wherein he relates his conversation with the Superintendent of Schools for the Orocovis District. Said Statement reads in part:

> "That it is true that on or about May 27, 1977, I personally visited Mrs. Nelida Melendez de Ortiz, the Superintendent of Schools at Orocovis School District, and informed her, in writing, that I wished to return to my position of (sic) school teacher at high school level during the 1977-78 school year, position in which I had tenure;
>
> "That on said occasion Mrs. Melendez informed me that my position was not necessary since it had already been determined at the Department's level (sic) that I was going to be removed from the position of school director and was going to be assigned to my permanent position of school teacher;"

Defendants argue that because Plaintiff was orally informed on May 27, 1977 that "it had already been determined [that he]

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[6] Ordinarily we would not cite or use as authority a holding found in an unpublished opinion, cf. Rule 14, Rules of the United States Court of Appeals for the First Circuit. However, no unfairness accrues in the present case since all parties in these related cases are represented by the same counsel.

was going to be removed from the position of school director" and reassigned to his previous position that this then is the date when Plaintiff "knew or had reason to know of his injury."

Plaintiff retorts that the date when his cause of action accrued was in August of 1977,[7] the date when the new school year started and he found himself out of a job as a school director. Under Plaintiff's argument it is at this point when he is in fact demoted and thus has suffered an "actual injury." Under Plaintiff's analysis the possibility or probability that an event might happen in the future is not sufficient to find that a right has been violated and thus to say that the computation of the time limit for the enforcement of that right began to run.

In *Allende Vazquez* v. *Chardon, et al., supra,* we were faced with the question of determining whether an identical cause of action accrued on the date the Plaintiff was officially notified that he was demoted or the date this demotion actually took effect, which was some time later. The factual framework now before us presents a third possibility: the date when Plaintiff was orally and unofficially informed that he would be reassigned. In *Allende Vazquez* we found the date of the official notice of reassignment controlled. The present case evinces no reason which would compel a different conclusion.

The rationale behind our holding in *Allende Vazquez* was, that after receipt of an official notice of reassignment, a Plaintiff who was aware of the impermissible reasons for the official action had a viable cause of action. In such a situation he could both seek and secure relief against the discrimination. However, applying the same reasoning to the case at bar we cannot draw the same conclusion. First, from the informal and unofficial information Plaintiff received in May, 1977 one could not conclude that Plaintiff lost all reasonable expectations that he would continue at his position. Second, and along the same

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[7] No specific date in August is advanced in this record by Plaintiff as the date when classes officially commenced for the 1977-1978 school year.

lines, from the informal conversation one cannot conclude that Plaintiff was in fact demoted or reassigned. Until he was informed officially Plaintiff had no reason to believe that he was demoted. Third, although even the threat of a politically motivated dismissal may have been sufficient to invoke a cause of action, see *Allende Vazquez*, at p. 5, it is unclear from the record before us whether at the May 27, 1977 conversation Plaintiff knew, or should have known, of the illegal motivations behind the decision to return him to his previous position.[8] The very fact that the object of this conversation was Plaintiff's contemplated voluntary return to his previous position is indicative of the contrary.

The above facts persuade us that our analysis in *Allende Vazquez* is equally applicable. The present type of cause of action accrues on the date Plaintiff is officially informed that he is being demoted and he is aware of the reasons for this demotion. It is at this point that there is present a "complete and present cause of action." *Rawlings* v. *Ray*, 314 U.S. 96, 98 (1948). In the present case this occurred on June 21, 1977. Therefore, a complaint filed on June 19, 1978 would be timely.

Lastly, in the file before us we note "Defendants' Opposition to Plaintiff's Motion to Strike Affirmative Defenses," January 31, 1980. We do not, however, find that Plaintiff has herein filed a Motion to Strike affirmative defenses. In any event because these defenses are identical to those reviewed in *Garcia Rosado* v. *Chardon*, Civil Number 79-74, we see no reason why our disposition with this question therein should not control here also.

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[8] Other than Plaintiff's own Sworn Statement, Defendants present no other factual material to substantiate this point. Because this is an issue of fact which is disputed, and indeed on the present record must be resolved against the Defendants, we must bear in mind the limitations of a Motion for Summary Judgment.

For all the above cited reasons Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 21st day of April, 1980.

/s/ JUAN R. TORRUELLA

JUAN R. TORRUELLA
U.S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 78-1156

JOSE ORTIZ RIVERA, *Plaintiff*,

v.

CARLOS CHARDON, individually as Secretary of Public Education of the Commonwealth of Puerto Rico,

and

OSCAR L. RAMOS, individually and as Assistant Secretary, in charge of Personnel of Public Education of the Commonwealth of Puerto Rico,

Defendants.

-SWORN STATEMENT OF JOSE RIVERA ORTIZ-

I, JOSE RIVERA ORTIZ, after being duly sworn according to the law, under oath, depose and say:

That my name is as specified above;

That I am of legal age, married, and a resident of Orocovis, Puerto Rico;

That, at present, I work as secondary school teacher at the high school of the school district of Orocovis;

That I am plaintiff in the above captioned class action;

That I was demoted or removed from the position of Secondary School Director, Category IV, on June 10, 1977 to Secondary School Teacher, effective said demotion on the beginning of the 1977-78 school year, as per letter dated on said date, signed by Mr. Julio Cintron Lopez, Director of Teacher's Personnel Division of the Department of Education of Puerto Rico.

That it is true that on or about May 27, 1977 I personally visited Mrs. Nelida Melendez de Ortiz, then Superintendent of

School at Orocovis School District, and informed her, in writing, that I wished to return to my position of school teacher at high school level during the 1977-78 school year, position in which I had tenure;

That, on said occasion Mrs. Melendez informed me that my petition was not necessary since it had already been determined at the Department's level that I was going to be removed from the position of School Director and was going to be assigned to my permanent position of school teacher;

That Mrs. Melendez did not receive my letter officially; did not file it nor put it in any part of the office where it could be filed later, but instead took the letter and placed and kept it on her purse;

That she didn't answer my letter, officially or otherwise;

That nobody else in the Department of Education answered my letter, officially or otherwise;

That the only letter I received in relation with this matter was the one dated June 10, 1977, in which, as it had been advanced by Mrs. Melendez, I was informed that I had been reinstalled to occupy position 0129 in the district of Orocovis as Secondary School Teacher.

That on June 30, 1977 I decided to take my case to the U.S. District Court since I then believed and still believe that my rights under the pertinent constitutional and legal provisions had been violated;

That I didn't withdraw my letter since I was told by Mrs. Melendez that said letter had no effect whatsoever, and, simultaneously she placed it in her purse;

That it is not true that I asked Mrs. Melendez, verbally, to be relocated to another school other than the one I had directed.

Given at San Juan, Puerto Rico, this 30th day of September, 1978.

/s/ *Jose Ortiz Rivera*
JOSE ORTIZ RIVERA
Deponet

Affidavit NO. *2101*

Sworn and subscribed to before me by MR. JOSE ORTIZ RIVERA, of legal age, married, and a resident of Orocovis, Puerto Rico, to me personally known in San Juan, Puerto Rico, this 30th day of September, 1978.

/s/ *Harry R. Nadal Arcelay*
HARRY R. NADAL ARCELAY
Notary Public